(1) Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1994

WILLIAM M. GURLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

MAY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONSIDER THE MIXED QUESTIONS OF LAW AND FACT, RAISED FOR THE FIRST TIME AT THE APPELLATE LEVEL, REGARDING WHETHER THE PETITIONER WAS SUED UNDER 42 U.S.C. §9607(a) IN AN INDIVIDUAL CAPACITY, RATHER THAN IN HIS CORPORATE CAPACITY; AND REGARDING THE EXISTENCE OF PRIVITY BETWEEN THE PETITIONER AND HIS CO-DEFENDANT, GURLEY REFINING CO., INC.?

II.

ONCE HAVING CONSIDERED THE QUESTIONS OF THE CAPACITY IN WHICH THE PETITIONER WAS SUED (PERSONALLY OR IN A CORPORATE CAPACITY), AND THE EXISTENCE OF PRIVITY BETWEEN THE PETITIONER AND HIS CO-DEFENDANT, GURLEY REFINING CO., INC., DOES THE RESOLUTION OF THOSE QUESTIONS UPON THE MERITS AT THE APPELLATE LEVEL CONSTITUTE AN UNACCEPTABLE EXERCISE OF THE COURT OF APPEALS' JURISDICTION WHEN NO SPECIAL CIRCUMSTANCES ARE PRESENT TO COMPEL SUCH RESOLUTION AND WHEN AN INTERESTED PARTY HAS NOT BEEN AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE ON THE ISSUES RESOLVED?

LIST OF PARTIES

The petitioner herein is William M. Gurley, and the respondent is the United States of America.[1]

LIST PURSUANT TO RULE 29.1

The petitioner is an individual without any relationships which come within the purview of Rule 29.1.

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[1] Other entities who are not petitioners herein but were defendants in the U. S. District Court were Gurley Refining Co., Inc. (dismissed on appeal), Larry Gurley, Gurley Refining Company (a partnership) (dismissed by the respondent with prejudice), Betty Gurley (dismissed by the respondent with prejudice) and R. A. Caldwell (dismissed by way of compromise at the commencement of the trial of this cause).

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 28, 1994.

OPINIONS BELOW

The pretrial opinion and order of the District Court that granted partial summary judgment to the respondent and against the petitioner is unreported and is

reproduced in the Appendix at A-30.[2] The subsequent opinion of the District Court resulting from the trial of this cause is reported at 788 F.Supp. 1473 and is reproduced at A-52. The opinion of the Court of Appeals is reported at 43 F.3d 1188 and is reproduced at A-1. The Order of the Court of Appeals denying rehearing is unreported and is reproduced at A-83.

JURISDICTION

The judgment of the District Court was entered April 29, 1993. A-82.[3] The judgment of the Court of Appeals was entered December 28, 1994. A-1. A timely petition for rehearing was denied on March 9, 1995. A-83. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review by writ of certiorari the judgment of the United States Court of Appeals for the Eighth Circuit which is the subject of this petition. The District Court possessed jurisdiction pursuant to 42 U.S.C. §9613(b).

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[2] References herein to "A-" are to the separately bound appendix filed herewith; to "R." to the record in the Appellees' Appendix in the Court of Appeals.

[3] The separate opinion of the district court issued March 27, 1992, and found at A-52, was not a final judgment; thus entailing the Amended Judgment of April 29, 1993.

STATUTES INVOLVED

1. CERCLA Section 107(a), 42 U.S.C. §9607(a):

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for—
>
> . . .

2. CERCLA Section 101(21), 42 U.S.C. §9601(21):

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States

Government, State, municipality, commission, political subdivision of a State, or any interstate body.

3. CERCLA Section 101(20)(A), 42 U.S.C. §9601(20)(A):

> The term "owner or operator" means . . . (ii) in the case of an onshore facility or an off-shore facility, any person owning or operating such facility. . . .

STATEMENT

The petitioner herein, from 1960 through the present time, was and is the president, director, chief executive officer, and majority stockholder of a closely held corporation known as Gurley Refining Co., Inc. (hereinafter "GRC"). GRC, during the sixties and seventies, engaged in the rerefining of used oil. That operation produced as a by-product a residue of oily waste, which was disposed of at a facility near Edmondson, Arkansas, between 1970 and 1975, under a permit from the State of Arkansas.[4] The disposal operation was terminated by GRC in 1975. Subsequent to the termination of the disposal operation and during the period of time between 1978 and 1979, rains and floods caused the waste in the facility to overflow into the surrounding area and the waters of the United States. The respondent reacted to

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[4] The facility had originally been a clay borrow pit owned by R. A. Caldwell. The petitioner negotiated a lease with Mr. Caldwell on behalf of GRC in 1970. A-30 and A-56.

these discharges by way of two cleanup efforts; the second of which was completed in 1979. A-55-59.

Thereafter, on December 12, 1980, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 became law. That Act, as amended, is found at 42 U.S.C. §§9601 *et seq.* ("CERCLA"). The facility described above was designated a National Priorities List site in August of 1983, pursuant to that statute. A-58. Despite the 1978 and 1979 efforts by respondent to remedy the problems at the facility, the respondent continued to consider the facility a problem, notwithstanding the fact that there were no discharges therefrom as late as the trial held by the District Court in 1990. The respondent, in December of 1983, authorized a Remedial Investigation of the site under the auspices of CERCLA. This investigation took place during 1984 and 1985, and resulted in a Feasibility Study being released in April of 1986. Contemporaneously with the Remedial Investigation, the respondent initiated an action in Federal District Court under the Clean Water Act against R. A. Caldwell ("Caldwell") and GRC for response costs incurred by it as a result of the remediation actions of 1978 and 1979. A final judgment was entered in that action against Caldwell and GRC in 1985. The respondent, in 1987, brought the instant action against Larry Gurley, William M. Gurley, Betty Gurley, GRC, Gurley Refining Company (a partnership), and R. A. Caldwell to recover costs associated with that Remedial Investigation and Feasibility Study. A-59-60.

A. Earlier Proceedings

The Edmondson facility and the 1978 and 1979 releases therefrom spawned two legal actions prior to the instant case.. The first was *Caldwell v. Gurley Refining Co., et al.*, 533 F.Supp. 252 (E.D. Ark. 1982), *aff'm on other grounds, Caldwell v. Gurley Refining Co.*, 755 F.2d 645 (8th Cir. 1985). The second was the *United States of America v. R. A. Caldwell and Gurley Refining Co.*, No. J-C-83-399, United States District Court, Eastern District of Arkansas, Jonesboro Division. The earlier case brought by Caldwell (owner of the property whereon the site was located) named as defendants in that action not only GRC, but also Larry Gurley, William M. Gurley and the United States. The United States was dismissed through motion practice prior to the trial and Larry Gurley and William Gurley had a verdict directed in their favor at the close of the plaintiff's proof.

The second case was filed by the respondent against R. A. Caldwell and GRC, pursuant to 33 U.S.C. §§1321 *et seq.*, in 1983. The trial of the second case resulted in a judgment being entered on October 30, 1985, finding Caldwell and GRC jointly and severally liable to the respondent for costs incurred by it in responding to the 1978 and 1979 releases at the Edmondson facility. It was this judgment that was relied upon by the Eighth Circuit in its finding that GRC was entitled to the defense of

res judicata in the instant appeal. A-14-20.[5]

B. District Court Jurisdiction, Proceeding, Ruling and Judgment

The respondent filed, on November 18, 1987, a 42 U.S.C. §9607 action against various defendants, including the petitioner, seeking reimbursement of response costs incurred by way of its Remedial Investigation and Feasibility Study of the GRC disposal pit and declaratory relief concerning liability for future costs. A-84. The District Court exercised exclusive original jurisdiction of this action pursuant to the provisions of 42 U.S.C. §9613(b). The respondent relied exclusively upon the 1978 and 1979 releases to justify its complaint. The complaint described petitioner as president and principal shareholder of GRC and, as such, responsible for the conduct and management of the company's disposal facility. Petitioner filed a timely answer and two amended and supplemented answers (A-94) alleging, among other things, that he was a privy of GRC and was thus entitled to join in the defense of *res judicata* along with that company. On June 29, 1989, respondent filed a motion for partial summary judgment against GRC and the petitioner. A-114. The respondent additionally sought to have the District Court dismiss the defense of *res judicata* that had been raised by both GRC and the petitioner. It essentially argued that the previous

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[5]The Circuit Court in its decision noted that the District Court had read the transcript of the 1985 trial. This is indeed a puzzling statement in light of the fact that only fifteen pages of Larry Gurley's testimony in that trial were made available to the District Court. (R. 72-87).

action relied upon as creating *res judicata (United States v. Caldwell, et al.)*, was brought pursuant to 33 U.S.C. §1321 (A-62-63) and that the respondent's second suit to recover costs pursuant to 42 U.S.C. §9607(a) constituted a different "cause of action." The respondent further argued that 42 U.S.C. §9613(g)(2), which allows successive actions to recover further response costs under §9607(a), forecloses any defense of *res judicata*, as it relates to a failure on the part of the respondent to couple an action under 33 U.S.C. §1321 with an action under 42 U.S.C. §9607. Nowhere in respondent's complaint or in its motion for partial summary judgment, or in the District Court's June 14, 1990, decision on such motion, was any question raised as to whether petitioner was a privy of GRC or in what capacity he was sued. Indeed, it is clear from the respondent's pleadings and the District Court's order for partial pretrial summary judgment that both the respondent and the District Court were of the opinion that the petitioner was sued in his corporate capacity. The impact of the June 14, 1990, decision foreclosed both questions from ever arising.

After the District Court denied the availability of the defense of *res judicata* it turned its attention to the question of liability of both defendants under §9607. In particular, it reviewed the pleadings, affidavits of respondent's experts and petitioner's discovery deposition. The District Court came to the conclusion that both GRC and petitioner were liable under §9607 and in particular found that the petitioner was personally liable because he, as president and principal stockholder, participated in the management of GRC (facility). A-42-44.

Thereafter, the trial commenced. After a truncated history of the trial, it was concluded in October of 1990.[6] The first portion of the trial focused upon the question of whether or not Larry Gurley was properly a defendant because of his employee status and his lack of control over the corporation.

Thereafter, the question of whether or not the respondent's costs were consistent with the NCP dominated. As previously observed, the District Court's pretrial granting of a partial summary judgment and the denial of the application of *res judicata*, precluded the possibility of petitioner presenting to the Court evidence that would establish his close relationship with GRC (bordering on near identity) at the time of the 1985 trial between the respondent, Caldwell, and GRC. The District Court ultimately entered a Memorandum Opinion and Order on March 27, 1992, which was subsequently amended by way of an Amended Judgment dated April 29, 1993. It was from the latter judgment that Larry Gurley, GRC, and the petitioner appealed to the United States Court of Appeals for the Eighth Circuit.

C. Court of Appeals Review Reversing in Part and Affirming in Part

The Court of Appeals reviewed the decision of the District Court below and delivered an opinion on De-

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[6] Prior to the commencement of the trial, the respondent dismissed Betty Gurley and Gurley Refining Company, a partnership, with prejudice. Also at the commencement of the trial, the government entered into a compromise with R. A. Caldwell.

cember 28, 1994, affirming in part and reversing in part. The portion of the Court of Appeals opinion to which this petition is directed occupies less than three pages (see *U.S. v. Gurley*, 43 F.3d 1188, 1197-1199 (8th Cir. 1994)). A-19-21. On appeal petitioner and GRC argued vigorously that the case of *United States v. Caldwell, et al.*, J-C-83-399, Slip Op. (E.D. Ark. October 30, 1985), (A-31-32, 37-38), was a vehicle sufficient to allow both to assert the doctrine of *res judicata* in the District Court. The Court of Appeals agreed that the respondent should have included the CERCLA count in its cause of action in *United States v. Caldwell* and thus held that GRC should be dismissed under the doctrine of *res judicata* because it was a party in that prior action. The Court observed that the respondent's second lawsuit asserted the same cause of action as was asserted in *United States v. Caldwell*, stating in its opinion that the 1983 action and the 1987 action "focused on the same underlying facts." A-16. The Eighth Circuit went on to examine the District Court's holding that the defense of *res judicata* could also be denied because of the express terms of 42 U.S.C. §9613(g)(2). It aptly rejected the reasoning that "EPA may pursue both a CWA action and a CERCLA action to right the same wrong" under the auspices of 42 U.S.C. §9613(g)(2). A-17.

After the Court held that the defense of *res judicata* was available to GRC, it then addressed two questions raised for the first time by the respondent in its appellate brief. The first question was whether petitioner was a privy of GRC. The second question was whether the respondent had sued the petitioner individually or in his corporate capacity as president and dominant stockholder of GRC. (An adjunct to this latter question was whether

the District Court, in its June 14, 1990 Order, had found petitioner liable in his individual capacity or, alternatively, in his corporate capacity.)[7]

Assuming, for the sake of argument, that, in addressing the two legal questions described above, the Circuit Court was not violating the teachings of *Singleton v. Wulff*, 428 U.S. 106 (1976), and *Hormel v. Helvering*, 312 U.S. 552 (1941), could it with impunity resolve these questions on the merits without allowing petitioner his day in court and without allowing petitioner to supplement the inadequate record applicable to these questions? The answer to the foregoing questions would seem to be a resounding "no" if *Hormel* and *Singleton* really mean what they say.

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[7] That paragraph in respondent's brief which raises these first-time questions reads as follows:

> Even if the *res judicata* challenge were well-founded, it would only preclude the United States' claim against GRC. William Gurley asserts that he was 'in privity' with GRC when *U.S. v. Caldwell* was decided and is therefore entitled to the same protection as the Corporation. But William Gurley was sued under CERCLA in his personal rather than his corporate capacity. 'This personal liability is distinct from the derivative liability that results from "piercing the corporate veil" where [courts] hold the owners of a less than bona fide corporation responsible for corporate acts.' . . . The extent of his control over GRC's defense in *U.S. v. Caldwell* has no bearing on his liability under CERCLA Section 107(a)(2) for his individual conduct as operator of the Gurley Pit.

(Citations omitted).

The Circuit Court, feeling no jurisdictional qualms, reached the merits of the questions of privity and capacity by merging the two questions. It astonishingly based its finding of lack of privity upon the fact that the respondent had not sued petitioner in his corporate capacity but solely in his individual capacity and further held that the District Court had found him liable in his individual capacity, as opposed to his corporate capacity. The Circuit Court, in effect, proceeded beyond the need to remand to determine the question of privity and in what capacity petitioner was sued. It, therefore, improperly resolved mixed questions of law and fact based upon an inadequate, if not non-existent, record.

The Circuit Court reasoned that since petitioner was sued in the 1987 action as an individual and not as a corporate officer under §9607, he was not in privity with GRC for the purposes of the 1983 action and could not therefore invoke the application of *res judicata.*[8]

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[8]The Court seems to overlook the fact that the threshold question regarding privity is whether the petitioner was a privy of GRC in the 1983 (1985 trial) case. The petitioner, at the very least should have been entitled to have the question remanded so that he could demonstrate, *inter alia,* his participation and control of the first litigation, domination of GRC by way of his presidency, dominant position as stockholder and CEO, and to further demonstrate the fact that he constituted the alter ego of GRC.

REASONS FOR GRANTING THE WRIT

The petitioner's appeal to the Eighth Circuit Court of Appeals contained, *inter alia*, the questions of whether the action brought by the respondent against petitioner and GRC was barred by the doctrine of *res judicata* and whether the District Court erred in granting the respondent's motion for partial summary judgment as to liability. When a circuit court is faced with those questions, it looks to the standard of review by which it is to adjudge the district court's rulings. Essentially, a determination of *res judicata* should revolve around the structure of the pleadings as they relate to the previous case purportedly creating *res judicata* and generally becomes a question of law, as opposed to a question of fact. When circuit courts review the granting of motions for summary judgment, they do so *de novo. United States ex rel., Glass v. Medtronic, Inc.*, 957 F.2d 605, 607 (8th Cir. 1992). As this Court has held, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The error that has been generated by the Court of Appeals is that subsequent to its determination that the doctrine of *res judicata* was available as a defense to GRC, it treated the question of petitioner's status as a privy of GRC as one that could be decided *de novo* when, in fact, that question, because it was a question of fact, at the very least, should have been remanded to the District

Court for briefing and a hearing on the merits.[9] As the Circuit Court has previously noted, "Who are privies ordinarily presents a question of fact requiring examination of the circumstances of each case as it arises." *Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317, 322 (8th Cir. 1966), cited with approval in *Towle v. Boeing Airplane Co.*, 364 F.2d 590, 593 (8th Cir. 1966).

The Eighth Circuit below has adopted a seemingly variable standard of review which enables it to reverse *de novo* the District Court's finding that *res judicata* was not available to GRC and then to uphold the District Court's finding of liability against the petitioner, based upon a determination on the merits that the petitioner was not a privy of GRC.[10] This procedural sleight of hand violates the Court's admonition concerning the sanctity of the salutary principle of *res judicata. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

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[9] This assumes, *arguendo,* that the Circuit Court properly allowed the question of privity to be raised at the appellate level.

[10] This determination, of course, was made notwithstanding the fact that the question had never been raised by the respondent below and had never been briefed and argued. Thus, the petitioner was not allowed to demonstrate his " 'close relationship, bordering on near identity' " to GRC. *Headley v. Bacon,* 828 F.2d 1272, 1276 (8th Cir. 1987). Nor was he allowed to establish that as a participating nonparty in the 1983 lawsuit, he had sufficient interest in the litigation between respondent and GRC to be bound by, and to take advantage of, the 1985 judgment in *U. S. v. Caldwell. In re Teletronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985).

The petitioner suggests in summary, that the Eighth Circuit generally adhered to the standard of review normally applicable to circuit courts when it reviewed the District Court's granting of a partial summary judgment on behalf of the respondent. However, once it determined that GRC should be dismissed from the action below based upon the doctrine of *res judicata*, it created a new playing field relative to the standard of review. On that playing field, the Circuit Court, having already determined that the first (1983) suit and the second (1987) suit contained the same cause of action, then took it upon itself to determine if the petitioner was a privy of GRC and thus entitled to invoke the protections afforded by the doctrine of *res judicata*. The issue of privity had never been addressed by the District Court; it had reasoned that even GRC, the party with which petitioner claimed to be in privity, was not entitled to invoke the doctrine of *res judicata* because (1) the two actions were not the same since each sought damages for costs incurred during different time frames and under different statutes, and (2) 42 U.S.C. §9613(g)(2) permitted successive actions to be brought to recover response costs or damages. See 788 F.Supp. at 1479. A-17. By deciding the question of privity upon the merits, the Circuit Court engaged in what this Court has characterized as an unacceptable exercise of its appellate jurisdiction. *Singleton, supra*, at 120.

Petitioner does not request this Court to resolve earthshaking matters of constitutional law but does urge that this Court resolve a question of fundamental fairness under law, *i.e.*, may a circuit court, through the abuse of

procedure and standard of review, circumvent this Court's mandates as to the doctrine of *res judicata.*

I. A. THE EIGHTH CIRCUIT'S TAKING UP FOR THE FIRST TIME ON APPEAL THE QUESTION OF THE EXISTENCE OF PRIVITY, IN THE ABSENCE OF ANY SPECIAL CIRCUMSTANCES, CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

B. THE EIGHTH CIRCUIT'S TAKING UP FOR THE FIRST TIME ON APPEAL THE QUESTION OF WHETHER THE RESPONDENT SUED THE PETITIONER IN HIS CAPACITY AS PRESIDENT AND PRINCIPAL SHAREHOLDER OF GURLEY REFINING CO., INC. AND WHETHER THE DISTRICT COURT IMPOSED LIABILITY UPON THE PETITIONER IN HIS CAPACITY AS PRESIDENT AND PRINCIPAL SHAREHOLDER, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

The petitioner addresses both parts A and B of I above in a single argument. The Eighth Circuit, in reaching its decision relative to the petitioner, accepted the respondent's argument (which was, as previously noted, advanced for the first time in one page of respondent's appellate brief) that if GRC was afforded the defense of *res judicata*, the petitioner was not a privy of GRC be-

cause he was sued in his individual, not corporate, capacity and therefore was not entitled to invoke the protections afforded by the doctrine of *res judicata.*

Because the District Court had no reason to look to the question of privity nor did the respondent have any reason to argue that privity did not exist while urging its motion for partial summary judgment to the District Court, these matters were not confronted in petitioner's appellate brief. It was only at the time that the respondent focused on the overwhelming law enunciated by this Court *(Brown v. Felsen,* 442 U.S. 127, 138. n 10 (1979); *Montana v. United States,* 440 U.S. 147, 154 (1979); *Parklane Hosiery Co. v. Shore,* 429 U.S. 322, 327 n 5 (1979); *United States v. Southern Ute Tribe or Band of Indians,* 402 U.S. 159, 162, 174 (1971)), relative to the parameters of *res judicata,* that it commenced to search for other legal arguments so as to foreclose the petitioner from successfully asserting that defense. This Court has observed that:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essentially in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, supra at 556.

The Court revisited the general rule expressed in *Hormel* in the case of *Singleton v. Wulff, supra,* noting that:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where 'injustice might otherwise result.' . . . Suffice it to say that this is not such a case. The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard.

428 U.S. at 121, citations omitted.

The Court appears to be saying that if the Court of Appeals addresses and resolves a question for the first time on appeal, it must properly find special circumstances to allow it to bypass the general rule enunciated in *Hormel.*[11]

Prior to its decision below, the Eighth Circuit had faithfully followed the mandates of *Hormel* and *Singleton.*

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[11] See, also, the case of *Commissioner v. McCoy,* 484 U.S. 3, 6 (1987), wherein this Court disposed of a petition through a summary *per curiam* opinion, the facts of which are very similar to the instant case. Additionally, it should be a matter of great interest to this Court that based upon a careful reading of the record, no special circumstances could possibly have existed.

In the case of *Stafford v. Ford Motor Company*, 790 F.2d 702 (8th Cir. 1986), the Circuit acknowledged that the general rule is that a federal appellate court will not consider issues not passed upon below, citing as authority *Singleton v. Wulff*. The Court observed that the rationale of the rule is twofold:

> First, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments. *[St. Louis Developmental Disabilities v. Mallory*, 767 F.2d 518 (1985)] *Mallory*, 767 F.2d at 521. Second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal. A litigant should not be surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence. *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941). A contrary rule could encourage a party to 'sandbag' at the district court level, only then to play his 'ace in the hole' before the appellate court.

790 F.2d 706.

The *Stafford* Court, quoting *Singleton*, observed that courts of appeals have discretion with regard to questions taken up and resolved for the first time. It noted that an appellate court is "justified" in considering an issue whose "proper resolution is beyond any doubt" or " 'where injustice might otherwise result,' " quoting *Hormel, supra*, at 557. A subsequent Eighth Circuit case enlarged upon reasons to consider an issue for the first time at the appellate level by observing an issue may be considered if it was a legal question that had been fully briefed and argued by the parties. *Estate of Vak v. Com-*

missioner of Internal Revenue, 973 F.2d 1409, 1412 (8th Cir. 1992).[12]

The Eighth Circuit in its decision enunciated no special circumstances in the instant case to enable it, for the first time, to address the questions of privity and capacity. As indicated in footnote 11 above, none existed. There was no constitutional question present whose answer was obvious. There was no miscarriage of justice which would otherwise result from the appellate court not acting as a district court regarding findings of fact, nor were the legal questions addressed by the Circuit Court ones that had been fully briefed and argued by the parties. To be sure, the greatest apparent injustice present in this case was created by the Eighth Circuit through its fundamentally unfair denial of the petitioner's day in court, which resulted in his becoming responsible for a money judgment in excess of $1.7 million plus interest, as well as a declaratory judgment against him for future response costs estimated to be in excess of $6 million. A-59, A-77.

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[12]This Court also appears to have created an exception for criminal cases when it noted that "The Court of Appeals recognized that it need not ordinarily consider grounds of objection not presented to the trial court." (Citing *Hormel.)* The Court went on to say that the above described rule has exceptions, particularly in criminal cases wherein appellate courts can take judicial notice of errors that impinge upon the fairness of the judicial proceedings. *Anderson v. United States,* 417 U.S. 211, 217, n 5 (1974).

II. A. WHEN THE EIGHTH CIRCUIT RULED UPON THE MERITS AS TO WHETHER THE PETITIONER WAS SUED IN A PERSONAL CAPACITY, RATHER THAN A CORPORATE CAPACITY, IN THE INSTANT CASE, IT FORECLOSED PETITIONER FROM PUTTING IN EVIDENCE THAT WOULD HAVE ESTABLISHED HIS CLOSE RELATIONSHIP, BORDERING ON NEAR IDENTITY, TO GRC, AND AS SUCH CONFLICTS WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF.*

B. THE EIGHTH CIRCUIT'S RULING UPON THE MERITS AS TO THE QUESTION OF PRIVITY, AFTER FINDING THAT THE DEFENSE OF *RES JUDICATA* WAS AVAILABLE TO GURLEY REFINING CO., INC., FORECLOSED THE PETITIONER FROM PUTTING INTO THE RECORD PROOF OF PRIVITY WHICH CONSTITUTED AN UNACCEPTABLE EXERCISE OF APPELLATE JURISDICTION IN CONFLICT WITH THIS COURT'S DECISIONS IN *HORMEL V. HELVERING* AND *SINGLETON V. WULFF* AND THE PRINCIPLES OF *RES JUDICATA* ENUNCIATED IN *HEISER V. WOODRUFF.*

This petitioner reiterates that the Eighth Circuit found the respondent had asserted the same claim in this action that it had asserted in the 1983 action. A-19. As was discussed above, the cause of action in the 1983 case and the cause of action in the 1987 case (the instant case)

arose out of the same "nucleus of operative facts." A-15.[13]

The petitioner has previously noted in this petition that the District Court found petitioner's liability (as well as GRC's) to be governed by §9607(a)(2). The Court relied, *inter alia*, on the cases of *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 746 (8th Cir. 1986) *(NEPACCO)*, *cert. denied*, 484 U.S. 848 (1987), and *State of New York v. Shore Realty*, 759 F.2d 1032, 1052 (2nd Cir. 1985). A-42. The fact is that notwithstanding the District Court's reliance upon *NEPACCO* and *State of New York*, *NEPACCO* found individual liability emanating not from §9607(a)(2) but from §9607(a)(3) and *State of New York* noted that the individual in question acquired personal liability as an owner and operator because he was an owning stockholder who managed the corporation. *Id.* at 1052. Neither the two cases above nor the opinion of the District Court below addressed the existence of privity. Thus, none of the three cases stand for the proposition that capacity in which the privy is sued must always be examined in the second case. Certainly the fact that the petitioner was sued under 42 U.S.C.

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[13] One should not lose sight of the fact that the District Court, in interpreting the respondent's action against GRC and petitioner, stated in its June 14, 1990, opinion that:

> The main dispute concerns whether any of the defendants are liable under section 107(a) which provides the categories of parties who are liable. The United States contends that GRC, Inc. and William Gurley are liable as owners and operators under Sections 107(a)(1) and (a)(2).

A-41.

§§9601, *et seq.*, (whether in a corporate or individual capacity) would have no impact on petitioner's right to the defense of *res judicata* if the privity between petitioner and GRC arose because there was near identity between the two or because as a nonparty he had directed and dominated the first litigation.

The apparent flaw in the Eighth Circuit's attempt to use its appellate jurisdiction to factually foreclose the question of privity for the petitioner was that it ignored the question of privity *vis-a-vis* GRC and the petitioner in the first action. One must remember it found the causes of action in both the first and second cases to be the same. It also then assumed that whether or not William M. Gurley enjoyed a relationship bordering on near identity with GRC and whether or not William M. Gurley, as a stockholder, alter ego and nonparty, had participated in and dominated the litigation in the first proceeding, it could reinterpret respondent's pleadings and the District Court's findings in the second proceeding so as to foreclose petitioner's right to the defense of *res judicata.* All of this is in violation of that mandate set out by this Court in *Heiser v. Woodruff*, 327 U.S. 726 (1946), *i.e.*, "no principle of law or equity . . . sanctions the rejection . . . of the salutary principle of *res judicata.*" *Id.* at 733.

This petitioner has previously pointed out that the Circuit Court further rejected the argument that 42 U.S.C. §9613(g)(2) by its operation allowed the respondent to bypass the application of *res judicata* (A-17) and that the Circuit found that GRC was a party to the prior action but that petitioner was not. A-19. The Circuit Court, having made that assessment, did not determine

whether there was a sufficient record before it to reach a mixed question of fact and law as to whether privity existed between GRC and the petitioner in the prior action. The Circuit Court bypassed that obligation in an adroit manner.

The Eighth Circuit addressed petitioner's relationship with GRC and discussed the newly raised issues of privity and in what capacity petitioner was sued (A-19-21), notwithstanding the fact that no true record existed from the District Court below as to those two propositions. The Court noted that "[a] person is in privity with another person if he has ' "a close relationship bordering on near identity." ' *Headley v. Bacon*, 828 F.2d 1272, 1276-79 (8th Cir. 1987)." A-20. Despite that observation and faced with limited findings of fact by the District Court that could very easily be interpreted in favor of the petitioner being an alter ego of GRC, the Eighth Circuit, invoking a *de novo* standard, found as a matter of law that Gurley had no close relationship with GRC. A-20.

Finally, the Court of Appeals examined the capacity in which petitioner had been sued, ostensibly for the purpose of determining whether privity existed in the second suit. This was procedurally improper. As stated above, privity is determined by the relationship of GRC and the petitioner in the first (1983) case. Any examination of the second (1987) case has to be for the purpose of determining whether the causes of action are the same in both cases. The Circuit Court, having found that with regard to the respondent and GRC the causes of action were the same, proceeded to reinterpret the respondent's complaint and the District Court's findings as follows:

> Here, William Gurley is the principal shareholder, the president, and one of two directors of GRC. The only other director and only other shareholder is his wife, Betty Gurley. It is undisputed that the district court imposed liability on him not in his capacity as principal shareholder, president, and director, but as an individual who meets §9607(a)(2)'s definition of 'operator.' Thus, William Gurley is not in privity with GRC and may not assert the defense of *res judicata.*

A-20-21.

In making the foregoing legal conclusion, the Eighth Circuit ignored contrary legal and factual conclusions made by the District Court. It thereupon relied upon a footnote in the case of *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983), (to the effect that directors, officers and shareholders not solely named as such in the second suit cannot claim privity with the corporation) *(Id.* at 410, n 3, A-20-21) to buttress its improper exercise of appellate jurisdiction.[14]

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[14]The Court's reliance on that footnote was clearly misplaced. Footnote 3 to *Oglala Sioux Tribe* stands for the proposition that directors of a corporation, when sued in that capacity, may be in privity with that corporation for the purposes of *res judicata.* It does not stand for the proposition that only such directors sued in such capacity may be in privity. Indeed, there are a number of ways in which a person may be in privity with a corporation, such as a shareholder with sufficient interest in the litigation by the corporation, participating and controlling that litigation, (1B Moore's Federal Practice ¶0.411[6] (2nd Ed. 1974), pp. III-253-254), or by other special relationships between the stockholder and the corporation, as well as the application of "substantial identity of parties." *Id.* at ¶0.411[9], pp. III-267-274.

This apparent legal conclusion (which is in truth a finding of fact) by the Court of Appeals is quite remarkable. One has but to examine the respondent's complaint, its requests for admissions, and the District Court's decision of June 14, 1990, to determine how really remarkable it is.

The complaint filed by the respondent described the petitioner as follows:

> On information and belief, William Martin Gurley, is president of and principal shareholder in Gurley Refining Co., Inc., and partner in Gurley Refining Company. William Gurley, at all times relevant herein, was responsible for the conduct and management of the Gurley site. William Gurley controlled the affairs and activities of Gurley Refining Company, Inc., and Gurley Refining Company.

A-86

This was the only description of the petitioner in the complaint filed by respondent in the second case.

Through requests for admissions in the second suit (A-105), the respondent sought to have William M. Gurley admit that in his "capacity" as president of GRC:

- He sought a site for disposal;
- He leased the site from R. A. Caldwell;
- He was the "operator" of the site as defined at 42 U.S.C. §9601(20)(A);

- He accompanied the driver who "dumped the first truckload of waste" at the site;

- He directed the activities of the employees of GRC;

and so on. A-107-113.

Finally, the District Court, in granting the respondent's motion for partial summary judgment, held " . . . that Gurley is personally liable because as a corporate official and major stockholder he was responsible for the daily management of the Pit and the disposal of hazardous wastes in the Pit." A-44.

Although the District Court did have the benefit of petitioner's discovery deposition, that deposition was not directed toward the question of the capacity in which he was being sued and, because the question of *res judicata* ceased to be a viable defense by the District Court's granting of the motion for partial summary judgment, the petitioner was foreclosed from testifying in the trial of the cause with regard to any legal point other than to question whether the respondent's costs of remediation were consistent with the national contingency plan. Thus, there was no legal way for petitioner to interject the question of privity or in what capacity he was being sued nor had the District Court or the respondent even broached those questions prior to the granting of the partial summary judgment.

The Eighth Circuit, in addressing the question of the capacity in which the petitioner was sued, seems to be taking a position that is contrary to law. As previously stated, the threshold question is whether petitioner was a

privy of GRC when the case of *United States v. Caldwell* was brought and subsequently tried. If that is answered in the affirmative, then it may be proper for the Circuit Court to determine if the petitioner was sued in any capacity other than that which created his privity in the first suit.[15] Certainly the Eighth Circuit below proceeded to manufacture a different capacity in which the petitioner was sued in the District Court as a means of justifying its denial of the petitioner his day in court. This would be in regard to both the question of privity and the question of capacity. As pointed out by this Court:

> We have no idea what evidence, if any, petitioner would, or could, offer in defense . . . , but this is only because petitioner has had no opportunity to proffer evidence. . . .
>
> * * *
>
> The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be

---

[15] This statement assumes that the matter of privity as between, in this case, GRC and the petitioner arose because of petitioner's activity as a stockholder, president, director, etc. The cases, such as *Oglala Sioux* and *Headley*, which stand for this examination of capacity, are not necessarily important to cases where privity has been created by a nonparty dominating the litigation in the first instance and by an individual who becomes an alter ego (under the facts of the case) of the corporation that is entitled to the defense of *res judicata*. The citation of *Headley* and *Oglala Sioux* by the Eighth Circuit in support of its finding that no privity exists assumes facts that are neither in the record nor available to that Court in any other fashion.

heard.

> Assuming, therefore, that the Court of Appeals had jurisdiction to proceed to the merits in this case, we hold that it should not have done so. To that extent, its judgment is reversed and the case is remanded with directions that it be returned to the District Court so that petitioner may file an answer to the complaint and the litigation proceed accordingly.

Singleton v. Wulff, supra, at 120-121.

The manner in which the Eighth Circuit decided the questions of privity and capacity on the merits also foreclosed (as previously indicated in footnote 8) petitioner's ability to demonstrate his overall nonparty control of the *United States v. Caldwell* litigation. This is particularly important with regard to petitioner being able to establish an additional reason why he is in privity with GRC. This Court has observed in *Montana v. United States, supra:*

> These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved. As this Court observed in *Souffront v. Compagnie des Sucreries,* 217 U.S. 475, 486-487, 54 L.Ed. 846, 30 S.Ct. 608 (1910), the persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be 'strangers to the cause. . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if

he had been a party to the record.'
440 U.S. at 154.

When one couples the teachings of this Court in *Hormel, Singleton* and *Montana* with the analogous authority of *Commissioner v. McCoy, Nevada v. United States,* 463 U.S. 110, 129-132 (1983), and *Fountain v. Filson,* 336 U.S. 681, 683 (1949), it becomes apparent that the Eighth Circuit has ignored this Court's admonition that:

> . . . Quite apart from these considerations, the Court of Appeals' resolution of the merits seems to us to be an unacceptable exercise of its appellate jurisdiction.
>
> As noted, with respect to the complaint's count that is before us, petitioner filed in the District Court only a pre-answer motion to dismiss for lack of standing. . . . In short, petitioner has never been heard in any way on the merits of this case.

Singleton at 119-120.[16]

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[16] *Cf. Thornburg v. American Coll. of Obst. & Gyn.,* 476 U.S. 747, 757, 821 (1986), wherein a majority of this Court recognized the application of *Singleton* but carved out an additional exception that allows a court of appeals to address a matter not addressed below if, *inter alia,* the facts are established or not relevant to the question reviewed. *Id.* at 757. It should be noted that the dissent in that case quoted with authority *Hormel* and *Singleton* and found *Fountain* to be analogous authority. *Id.* at 821. Also, *cf. Kamen v. Kemper Financial Services,* 500 U.S. 90, 100, (1991), wherein this Court, in remanding a matter for consideration by the Court of Appeals, took the trouble to note that despite its position in the instant case, it did not "mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of fa-

III. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING THIS PETITION.

In summary, the petitioner respectfully submits to this Honorable Court that special and important reasons exist for the granting of his petition for a writ of certiorari. It is clear from the foregoing that the Eighth Circuit Court of Appeals has departed so far from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is called for. Notwithstanding the mandate of this Court as contained in *Singleton* and *Hormel*, the Circuit Court has taken upon itself the determination of the issues of privity and capacity upon the merits although no special circumstances existed for such determination and although an insufficient record was before the Court. In so doing, it has deprived the petitioner of his fundamental right to present evidence showing that his relationship to GRC at the time of the 1983 action was such that he, like his alter ego GRC, is entitled to the protections afforded by the doctrine of *res judicata*. By depriving him of the defense of *res judicata*, the Circuit Court has unfairly subjected him to monetary liability approaching $10 million. The petitioner respectfully petitions this Court to issue a writ of certiorari and, because the Eighth Circuit's opinion constitutes a direct rejection of this Court's mandates in *Hormel*, *Singleton* and *McCoy*, petitioner respectfully urges the Court to dis-

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vorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments. *See* generally *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976)...." 114 L.Ed.2d at 166.

pose of this matter through a summary *per curiam* opinion.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

WILLIAM M. GURLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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United States Court of Appeals
for the Eighth Circuit

No. 93-2699

United States of America, *Plaintiff/Appellee*,

v.

Larry Gurley, *Defendant/Appellant*,
Betty Gurley; R. A. Caldwell;
Gurley Refining Company; Gurley
Refining Company, Inc.; William
Martin Gurley, *Defendants*.

No. 93-2702

United States of America, *Plaintiff/Appellee*,

v.

Gurley Refining Company, Inc.;
William Martin Gurley, *Defendants/Appellants*
Larry Gurley; Betty Gurley;
R. A. Caldwell; Gurley Refining
Company, *Defendants*.

Appeals from the United States
District Court for the
Eastern District of Arkansas

Submitted: January 12, 1994
Filed: December 28, 1994

Before HANSEN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and KOPF, District Judge.*

HANSEN, Circuit Judge.

The Environmental Protection Agency (EPA), on behalf of the United States, brought this action to recover the costs of cleaning up a hazardous waste site near Edmonson, Arkansas. The district court entered judgment for the EPA, imposing liability for past costs ($1,786,502.92) and future costs (estimated at $6,000,000) on defendants Gurley Refining Company, Inc.; its principal shareholder and president, William Gurley; and an employee, Larry Gurley. These defendants appeal, raising several issues, the most significant of which are the argument that the present action is precluded by a prior action brought against the Gurley Refining Company, Inc., in 1983 and the argument that Larry Gurley's role in the company's disposal of hazardous waste was too tenuous to make him liable as an "operator" of a hazardous waste facility. We affirm in part and reverse in part.

I.

The facts of this case are well stated in the district court's memorandum order, *see United States v. Gurley*

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*The HONORABLE RICHARD G. KOPF, United States District Judge for the District of Nebraska, sitting by designation.

Refining Co., 788 F.Supp. 1473, 1476-78 (E.D. Ark. 1992), and we will merely summarize them here. From 1970 to 1975, the Gurley Refining Company (GRC) rerefined used motor oil. GRC treated the used motor oil with sulfuric acid, mixed it with clay to absorb impurities, filtered out the clay, and sold the resulting rerefined oil. GRC then disposed of an acidic sludge and the spent clay in a borrow pit[1] it had leased from R. A. Caldwell pursuant to a permit issued for that purpose by the Arkansas Department of Pollution Control and Ecology (ADPCE). *Id.* The wastes of the rerefining process contained hazardous materials such as barium, lead, zinc, PCBs, and sulfuric acid. (Appellee's Br. at 4.)

In October 1975, GRC discontinued its rerefining processes and stopped disposing of wastes at the pit. In 1978, the United States Fish and Wildlife Service discovered that contaminated water from the pit had spilled over and damaged nearby fish and waterfowl habitats. The Service reported this to the EPA, which performed some work on the pit to prevent future spillovers.

But in the spring of 1979, after heavy rains, the pit overflowed again, releasing about a half million gallons of oily water into the surrounding area. The EPA could not persuade Caldwell or GRC to clean up the pit, so later that year it again performed work on the site to contain

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[1] A "borrow pit" is "an excavated area where material (as earth) has been borrowed to be used as fill at another location." *Webster's Third New Int'l Dictionary* 257 (1986).

and treat wastes. In 1983, the EPA brought an action against Caldwell and GRC under the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. §§1251-1376, to recover the costs it had incurred in 1979. In 1985, the district court entered judgment in favor of the EPA and against Caldwell and GRC in the amount of $76,758.60. *See United States v. Caldwell*, J-C-83-399, slip op. at 9 (E.D. Ark. Oct. 30, 1985), *reprinted in* Appellant GRC's & William Gurley's Br. at A34-A45. GRC did not appeal.

Meanwhile, in 1983, the pit was listed on the EPA's National Priorities List. In 1985, an investigation conducted on behalf of the EPA revealed that the site was still contaminated. In 1986, a feasibility study proposed four alternative courses of remedial action. The EPA chose the third alternative, which called for stabilization of the soil and contaminates, disposal of the soil and contaminates in an on-site landfill, backfilling of the excavated area, construction of flood protection, on-site treatment of contaminated water, and annual groundwater monitoring. *Gurley Refining Co.*, 788 F.Supp. at 1477.

Then in 1987, the EPA brought this action to recover the costs, both past and future, of the remedial action it had adopted after the 1986 study. Before trial, defendant Betty Gurley was dismissed from the case, and defendant R. A. Caldwell settled with the EPA. *Id.* at 1476 n.2. The matter was tried to the court for eight days in June and September of 1990. The district court entered

judgment for the EPA on March 27, 1992, concluding that GRC, William Gurley, and Larry Gurley should be jointly and severally liable for cleanup costs, with prejudgment interest from September 10, 1990. The district court also entered a declaratory judgment that those three defendants shall be liable for the costs of all remedial action taken by the EPA in the future. The three defendants appeal.

II.

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675. Under the Act, persons who are responsible for the release of hazardous substances may be liable for the costs of removing or remedying the contamination, the costs associated with damage to natural resources, and the costs to human health. *See id.* §9607(a); *see also Dravo Corp. v. Zuber,* 13 F.3d 1222, 1225 (8th Cir. 1994). The EPA may initiate a civil action to recover these costs. *See* 42 U.S.C. §§9607(a), 9613(h).

A.

Larry Gurley argues that he should not be held liable because, in short he was merely an employee of GRC. He argues in the alternative that imposing liability on him for conduct that preceded CERCLA's enactment would violate the Due Process Clause.

1.

Liability for the release of hazardous substances may be imposed on "any person who at the time of disposal of any hazardous substance **owned or operated** any facility at which such hazardous substances were disposed of." 42 U.S.C. §9604(a)(2) (emphasis added). The EPA does not contend that Larry Gurley had an ownership interest in either GRC or the site of the facility. Thus, he can be held liable only if he is an "operator." Larry Gurley argues specifically that the term "operator" should be limited to those individuals who had the "authority, responsibility, and capacity to control the corporate conduct in question." (Appellant Larry Gurley's Br. at 11.) He contends that he did not have the authority to determine whether or how to dispose of hazardous wastes because he was not an officer, director, or shareholder in GRC and because his father, William Gurley, possessed nearly exclusive authority over GRC's operations.

CERCLA defines "owner or operator" simply as "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." *Id.* §9601(20)(A)(ii). It is clear that the term "person" may include individuals, *see id.* §9601(21), but it is not clear when an individual should be deemed to have "operated" a hazardous waste disposal facility. In *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) *(NEPACCO)*, *cert. denied*, 484 U.S. 848 (1987), we held that an individual could be held liable for the release of hazardous substances under a different subsection,

which imposes liability on a person who "arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person," *see* 42 U.S.C. §9607(a)(3). We found that the individual defendant "possessed" the hazardous substances because he "had actual 'control' over the NEPACCO plant's hazardous substances." *NEPACCO*, 810 F.2d at 743. We also stated, "It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *Id.* Thus, we affirmed a finding that the individual had "possessed" hazardous substances on two closely related but distinct grounds: that the individual had "actual control" of the hazardous substances and that he had "authority to control" their disposal.

Federal courts have struggled with these two concepts when addressing the question of whether an individual may be found liable as an "operator" under §9607(a)(2). In some circuits, a plaintiff must prove that an individual defendant had **actual** responsibility for, involvement in, or control over the disposal of hazardous waste at a facility. *See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (holding that plaintiff must allege that individual defendant "**directly** and **personally** engaged in conduct that led to the specific environmental damage at issue"); *Riverside Market Devel. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (holding that proper focus is "the extent of [individual] defendant's personal participation in the alleged wrongful conduct"), *cert. denied*, 112 S.Ct. 636 (1991); *New York v. Shore Realty Corp.*, 759 F.2d, 1032,

1052 (1st Cir. 1985) (holding that individual defendant was "operator" because he was "in charge of the operation of the facility"); *see also Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F.Supp. 1454, 1457 (N.D. Cal. 1991) ("an individual cannot be liable as an 'operator' under CERCLA Section 107(a)(2) [42 U.S.C. §9607(a)(2)] unless the individual actually participates in the operation of the facility at which hazardous substances are disposed of, exercised control over the company immediately responsible for the operation of that facility, or is otherwise intimately involved in that company's operations").

On the other hand, in one circuit, a plaintiff can succeed by proving less than that; an individual defendant " 'need not have exercised actual control in order to qualify as [an] operator[s] under §9607(a)(2), so long as the **authority** to control the facility was present.' " *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-37 (4th Cir. 1992) (emphasis added) (quoting *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 113 S.Ct. 377 (1992)); *see also Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F.Supp. 389, 397 (E.D. Va. 1994) (holding that individual defendant may be liable if he has "the 'authority to control' activities on the facility"); *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F.Supp. 144, 152-153 (D. Me. 1992) (holding that liability is proper if individual defendant had authority such that he "could have prevented the hazardous waste discharge"); *cf. Kelley v. Thomas Solvent Co.*, 727 F.Supp. 1532, 1543-44 (W.D. Mich. 1989) (stating that court

should "weigh the factors of the corporate individual's degree of authority" but also should consider "evidence of responsibility undertaken and neglected").

An individual defendant who has actual control over the operation of a facility presumably also has authority to control the operation of the facility, with the possible exception of an individual acting *ultra vires*, a situation not present in this case or in the cases cited above. Thus, in reality, the two approaches differ in that one requires a plaintiff to prove that the defendant both had the authority to control the operation of the facility **and** actually exercised that authority, while the other requires a plaintiff to prove only that a defendant had the authority to control the operation of the facility.

We believe that the latter approach is inconsistent with the term "operator," whose common meaning is "one that produces a physical effect or engages himself in the mechanical aspect of any process or activity." *Webster's Third New Int'l Dictionary* 1581 (1986). Likewise, the verb "to operate" means "to perform a work or labor," to "exert power or influence," to "produce an effect," "to cause to occur," or to "bring about by or as if by the exertion of positive effort or influence." *Id.* at 1580-81. These definitions connote some type of action or affirmative conduct, an element not required by those courts that ask only whether a defendant had the authority to control the operation of the facility. We prefer not to interpret the statute in a manner that would produce the anomalous result of imposing CERCLA liability on an "operator"

who in fact never "operated" a facility. Thus, we hold that an individual may not be held liable as an "operator" under §9607(a)(2) unless he or she (1) had authority to determine whether hazardous wastes should be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks. We believe that this rule is the wiser of the two choices reflected in the existing case law and is faithful to our closely analogous decision in *NEPACCO.*

The district court made oral findings that Larry Gurley "personally participated in the disposal of the hazardous substances in question in the pit that is involved in this litigation" and that he "had extensive authority in an effort to implement the policies and practices of the corporate entity, which included the disposal of these hazardous substances." (Trial Tr. at 210-11.) In fact, the district court found those facts to be "crystal clear." *Id.* These findings address both prongs of the standard we have set out above. We review the district court's findings for clear error. *See* Fed. R. Civ. P. 52(a).

The record reveals that GRC had approximately six employees from 1970 to 1975 and that William Gurley, who was the principal shareholder, had ultimate responsibility for the business and took an active role in its management. In particular, William Gurley negotiated the lease with R. A. Caldwell for the property that later contained the pit, oversaw construction of the disposal facili-

ty, and directed employees to dispose of rerefining wastes there. The record also reveals that Larry Gurley began working in the rerefining plant in 1969 after his graduation from college. In that role, he helped load the trucks that hauled hazardous wastes to the pit. In 1972, he moved into the administrative offices, where he served as GRC's purchasing agent.

But several parts of the record also reveal that Larry Gurley's duties were broader than just purchasing. First, Larry Gurley testified in 1983 in *Caldwell v. Gurley Refining Co.*, No. J-C-79-101 (E.D. Ark.), *aff'd*, 755 F.2d 645 (8th Cir. 1985), that he eventually became "director of operations," a job which "basically put me in control of the day to day operations of the plant and anything that pertains to that." (Appellee's App. at 41.) He testified that his father tended to other businesses while he took care of GRC *(Id.)* Second, when the ADPCE contacted GRC in 1973 to express its concern about the pit, Larry Gurley personally responded in a letter that said, "I received your letter concerning the pit where we dump our waste material. I made a visual inspection of the pit area today." *(Id.* at 1.) Third, Larry Gurley testified in 1983 that he "would have to take responsibility for" installing a pump and hose in the pit in 1974 that caused ADPCE to complain. *(Id.* at 45-56). Fourth, in 1974, Larry Gurley personally responded to a letter from the West Memphis, Arkansas, City Attorney concerning the discharge of oil from the pit into the surrounding area. *(Id.* at 2-3.) Fifth and finally, Larry Gurley's responsibility for waste disposal is evidenced by the role he played in closing down the

pit and filing reports with the ADPCE. He personally sent at least one letter to the ADPCE, *(id.* at 9), and he wrote and signed a report concerning the closure of the pit. He testified that the report reflected an engineer's recommendations and GRC's agreement with the ADPCE, which he apparently had negotiated. *(Id.* at 49-50).

Although Larry Gurley argues that he acted as a mere "wordsmith" for his father, (Appellant Larry Gurley's Reply Br. at 9), we are not convinced. The letters were sent under Larry Gurley's name. In fact, William Gurley testified in 1983 that Larry Gurley bore responsibility for the report filed with the ADPCE because "[h]e was operational manager; he had the latitude to make decisions of this kind." *(Id.* at 39). Although Larry Gurley testified at the trial of this case that he is simply following William Gurley's directions on these matters, it is apparent that he had substantial responsibilities of his own between 1972 and 1975. The district court, which read the transcripts of the 1983 trial and heard the testimony of Larry Gurley and William Gurley at the trial of this action, reasonably concluded that Larry Gurley "personally participated in the disposal of the hazardous substances" and "had extensive authority" over GRC's disposal of hazardous wastes.

We think Larry Gurley's argument places too much emphasis on his status within GRC and not enough emphasis on his actual activities. Although he was not an officer, director, or shareholder, he nonetheless had substantial responsibilities for GRC's waste disposal. Perhaps

persons who are officers, directors, or shareholders are more likely to cause a company to dispose of hazardous wastes, but we decline to confer immunity on all persons who do not hold such positions. An individual defendant's responsibility for the disposal of hazardous waste should be judged on a case-by-case basis. In this case, the evidence clearly and strongly supports the district court's findings that Larry Gurley had authority to determine GRC's hazardous waste disposal activities and that he actually exercised that authority.

For these reasons, the district court did not err when it found that Larry Gurley was liable as an "operator." *See* 42 U.S.C. §9607(a)(2).

2.

Larry Gurley's second argument, that the imposition of liability for conduct that preceded CERCLA's effective date violates due process, is squarely foreclosed by *NEPACCO*, where we held that CERCLA was intended to apply retroactively and that such retroactive application does not violate the Due Process Clause. 810 F.2d at 732-34. For due process purposes, Larry Gurley's circumstances are no different from the circumstances of the defendants in *NEPACCO*.

B.

GRC and William Gurley argue that the district court's judgment should be reversed because (1) under

the res judicata doctrine, the EPA's present action is precluded by the CWA action it brought in 1983; (2) under the collateral estoppel doctrine, the EPA is precluded by positions it took in the prior action from proving the appellants' liability in this action; (3) the waste deposited at the pit falls within CERCLA's petroleum exclusion; (4) the district court erred by granting partial summary judgment; (5) the disrict court erred when it admitted certain exhibits into evidence; (6) the district court erred when it included attorney fees in the award of damages; (7) and the EPA acted arbitrarily and capriciously when it sought to recover its cleanup costs from the appellants. Larry Gurley joins in these arguments, incorporating them by reference. *(See* Appellant Larry Gurley's Br. at vii n.1.)

The appellants first argue that this action is barred because the EPA earlier pursued a CWA action against GRC. Under the res judicata doctrine, which also is known as claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). A prior judgment is binding " ' "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. " ' " *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 579 (1974) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876))); *see also Lane v. Peterson*, 899 F.2d. 737, 741 (8th Cir.) ("res judicata precludes the relit-

igation of a claim on grounds that were raised or could have been raised in the prior action"), *cert. denied*, 498 U.S. 823 (1990). Here, the parties essentially agree that the prior case went to "final judgment" and that GRC was a party to it. Thus, whether res judicata bars the present action depends on whether the present action presents the "same cause of action" as the EPA presented in its 1983 action and on whether these appellants may assert the defense.

a.

Whether the present action is the "same cause of action" as the prior action depends on whether it "arises out of the same nucleus of operative facts as the prior claim." *Lane*, 899 F.2d at 742; *see also Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 487 (8th Cir. 1992). The legal theories of the two claims are relatively insignificant because "a litigant cannot attempt to relitigate the same claim under a different legal theory of recovery." *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982); *Ruple v. City of Vermillion*, 714 F.2d 860, 861 (8th Cir. 1983); *see also Restatement (Second) of Judgments* §24 cmt. c (1982), *quoted in Poe*, 695 F.2d at 1106 n.5. To determine whether the present claim and the prior claim constitute the same claim, we consider " 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. . . . " *Lane*, 899 F.2d at 742 (quoting *Restatement (Second) of Judgments* §24(2) (1980)).

Here, the present action and the prior action focussed on the same underlying facts. Each action concerned the appellants' disposal of hazardous waste in the borrow pit on the Caldwell property in the 1970s and the later release of those wastes. Thus, they are closely "related in time, space, [and] origin." *Id.* Furthermore, they "form a convenient trial unit" because each action depends on the same evidence of appellants' actions. In fact, in the present action, the EPA introduced into evidence transcripts of testimony from the prior CWA action. *(See* Appellee's App. at 71-87.)

The district court reasoned that res judicata does not apply because the prior action concerned the EPA's cleanup activities in the 1970s while the present action concerned the EPA's cleanup activities in the 1980s. *See* 788 F.Supp. at 1479. We believe that the district court improperly focussed on the plaintiff's conduct when it identified the underlying facts. " 'In the final analysis the test would seem to be whether **the wrong for which redress is sought** is the same in both actions.' " *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446, 449 (8th Cir. 1979) (emphasis added) (quoting *Woodbury v. Porter*, 158 F.2d 194, 195 (8th Cir. 1946)). A "claim" should be determined not by the actions of a plaintiff vindicating its rights but by the conduct or alleged conduct of a defendant breaching those rights. *See Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1326 (7th Cir. 1992) (holding that RCRA action is barred by prior RCRA action because, in part, "new evidence of injury differs from a new wrong").

The district court also reasoned that res judicata does not apply because

> CERCLA itself contemplates that the two actions can be brought, and that [the] first will not bar the second. Pursuant to Section 113(g)(2), the United States may bring successive actions to recover further response costs or damages. 42 U.S.C. §9613(g)(2). Thus, according the language of the statute, the United States did not have to bring its section 107 action at the time it brought its action under the Clean Water Act.

788 F.Supp. at 1479. We believe the district court's conclusion—that the EPA may pursue both a CWA action and a CERCLA action to right the same wrong—is not supported by the statute, which permits only successive CERCLA actions, i.e., one CERCLA action after another CERCLA action. The EPA essentially concedes that §9613(g)(2) is limited in this way, but it urges us to give the statute a "generous interpretation" on the ground that "there is no reason to think that Congress would have intended a different result where the initial judgment awarded the costs of a CWA removal action rather than a CERCLA removal action." (Appellee's Br. at 14.) We decline to extend §9613(g)(2) beyond its self-defined scope and instead choose to apply the res judicata doctrine in a straightforward manner. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata.*' " *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733

(1946)); *see also id.* ("The Court of Appeals' reliance on 'public policy' is similarly misplaced.")

We understand that cleaning up hazardous wastes can be time-consuming and that in this case the scope of the cleanup was not known until April 1986 when the choice was made by EPA among the four alternative courses of action outlined by the feasibility study, and we also understand that the EPA's CWA claim was subject to a statute of limitations. But these facts do not relieve the EPA of its obligation to abide by the requirements of the res judicata doctrine. The EPA could have asserted a CERCLA claim when it filed the CWA action in December 1983 or while that case was pending, *see* Fed. R. Civ. P. 15. In fact, the EPA asserts that "[c]ommunications with the defendants, aimed at persuading them to assume responsibility for the response, continued throughout this period." (Appellee's Br. at 16.) The appellants' release of hazardous waste in the late 1970s, combined with the passage of CERCLA in 1980, made the present action possible in 1983. *Cf. United States v. Fisher*, 864 F.2d 434, 439 (7th Cir. 1988) (holding that CERCLA action was not barred by res judicata because defendant allegedly released additional hazardous substances after prior action was completed and because statutory amendments created rights that could not have been asserted at time of prior action). The EPA chose to purse a CWA action in 1983, and that choice precluded it from pursuing a subsequent CERCLA action for the same wrong in 1987.

Our conclusion that the EPA asserts the same claim in this action that it asserted in the prior action is consistent with analogous cases from this circuit and other circuits. *See Johnson v. SCA Disposal Servs., Inc.*, 931 F.2d 970, 974-77 (1st Cir. 1991) (holding that negligent misrepresentation action filed before plaintiff incurred cleanup expenses precluded later CERCLA reimbursement action); *United States Envtl. Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1403-05 (8th Cir. 1990) (holding that intervening citizens' CWA action was precluded by consent decree entered into by EPA and defendant), *cert. denied*, 112 S.Ct. 414 (1991); *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 42-44 (4th Cir. 1990) (holding that false representation suit precluded later CERCLA reimbursement action). Our conclusion also is consistent with the purpose of the res judicata doctrine: to protect defendants "from the expense and vexation attending multiple lawsuits," to "conserve[ ] judicial resources," and to "foster[ ] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54; *see also Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) ("The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water.").

b.

GRC may assert the defense of res judicata because it was a party to the prior action. Neither William Gurley nor Larry Gurley, however, were parties to the prior action. Thus, each of them may assert the defense

only if he is a "privy" to GRC. *See Montana*, 440 U.S. at 153. A person is in privity with another person if he has a " 'close relationship, bordering on near identity.' " *Headley v. Bacon*, 828 F.2d 1272, 1276-79 (8th Cir. 1987).

As a general rule, "[c]orporations are treated as entities separate from their officers, directors, and shareholders for purposes of preclusion just as for other purposes. Without more, judgments entered in actions against any one of them are not binding on any other." Charles Alan Wright et al., *Federal Practice and Procedure* §4460, at 533 (1981). As an exception to this general rule, directors, officers, and shareholders may be in privity with a corporation and thereby assert a res judicata defense if "they are named as defendants solely in their capacity as directors," officers, and shareholders. *See Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1410 n.3 (8th Cir. 1983); *cf. Headley*, 828 F.2d at 1276-79 (holding that prior action against city did not bar subsequent action against police chief in his personal capacity); *Micklus v. Greer*, 705 F.2d 314, 316-17 (8th Cir. 1983) (holding that prior actions against government officials barred subsequent action against another government official in her official capacity). Here, William Gurley is the principal shareholder, the president and one of two directors of GRC. The only other director and the only other shareholder is his wife, Betty Gurley. It is undisputed that the district court imposed liability on him not in his capacity as principal shareholder, president, and director, but as an individual who meets §9607(a)(2)'s definition of "operator." Thus, William Gurley is not in privity with GRC

and may not assert the defense of res judicata. *See Oglala Sioux Tribe*, 722 F.2d at 1410 n.3.

As a general rule, "litigation by an employer is not binding on employees." Wright et al., *supra*, §4460, at 531; *see also Headley*, 828 F.2d at 1276. Larry Gurley had and has no ownership interest in GRC. As an employee, he is even more removed from GRC's interests than is William Gurley. Thus, he is not in privity with GRC and may not assert the defense of res judicata.

In sum, the EPA was precluded from bringing this action against GRC. The EPA was not precluded from bringing this action against William Gurley and Larry Gurley.

2.

The appellants next argue that the EPA is precluded from proving liability in this action by certain positions it took in the CWA action. The appellants specifically contend (1) that the EPA should be precluded from proving that CERCLA's petroleum exclusion does not apply because the EPA proved in the prior action that GRC had disposed of oil and (2) that the EPA should be precluded from proving that William Gurley and Larry Gurley were "operators" under §9607(a)(2) because the EPA had proved in the prior action that GRC was an "operator."

Under the doctrine of collateral estoppel, which also is known as issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana*, 440 U.S. at 153. The appellants were entitled to rely on collateral estoppel in this case if

> "(1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue."

Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347, 356 (8th Cir. 1984) (quoting *Oldham v. Pritchett*, 599 F.2d 274, 279 (8th Cir. 1979)), *cert. denied*, 469 U.S. 1158 (1985).[2]

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[2] Although mutuality generally is not required for collateral estoppel, the EPA argues, in part, that William Gurley and Larry Gurley should not be permitted to assert collateral estoppel because they were not parties to the prior action. This argument rests on an unsettled issue of law. *Compare United States v. Mendoza*, 464 U.S. 154, 162 (1984) (holding that nonmutual offensive collateral estoppel may not be asserted against the government), *with United States v. Stauffer Chem. Co.*, 464 U.S. 165, 174 (1984) (holding that mutual defensive collateral estoppel may be asserted against the government). Nonetheless, we need not reach the issue because we can resolve this part of the appeal on other grounds.

The appellants' first contention stumbles on the requirement that the issue in the present case be identical to the issue in the prior case. *See Aetna Cas. & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992). In the prior action, the EPA sought to prove, and did prove, that GRC had disposed of either "hazardous substances" or "oil." *See* 33 U.S.C. §1321(b)(1). Under the CWA, "oil" is defined as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil." *Id.* §1321(a)(1). In this action, GRC sought to prove that it had disposed of "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F)." 42 U.S.C. §9601(14). Although these two definitions may overlap to some degree, a substance that is included in CWA's definition of "oil" is not necessarily exempted from CERCLA's definition of "petroleum." *See infra* part II.B.3. Thus, the issue in the prior case and the issue in the present case are not identical, and the appellants may not assert collateral estoppel on this issue.

The appellants' second contention also fails. Whether GRC was an "operator" under CWA in the prior action is distinct from the question of whether William Gurley and Larry Gurley were "operators" under CERCLA. Thus, the issue in the prior case and the issue in the present case are not identical, and the appellants may not assert collateral estoppel on this issue.

In sum, the EPA was not precluded from proving the necessary elements of GRC's, William Gurley's, and Larry Gurley's liability.

3.

The appellants next argue that the wastes they deposited at the pit fall within CERCLA's petroleum exclusion, which states, in part: "The term ['hazardous substances'] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F). . . . " 42 U.S.C. §9601(14).

A petroleum product may be exempted from CERCLA " 'even though certain of its indigenous components and certain additives [added] during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA.' " *Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir. 1993) (emphasis omitted) (quoting *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d. 801, 810 (9th Cir. 1989)). However, " 'hazardous substances which are added to petroleum or which increase in conjunction solely as a result of contamination of the petroleum during use are not part of the "petroleum" and thus are not excluded from CERCLA.' " *Southern Pacific Transp. Co. v. California*, 790 F.Supp. 983, 986 (C.D. Cal. 1991) (quoting EPA General Counsel, *Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* 5 (July 31, 1987)); *see also Cose*, 4 F.3d at 704 (citing 50 Fed. Reg.

13,460 (Apr. 4, 1985)); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992); *United States v. Amtreco, Inc.*, 846 F.Supp. 1578, 1584-85 (M.D. Ga. 1994).

Here, the appellants disposed of rerefining wastes that consisted of oil, clay, barium, lead, zinc, PCBs, and sulfuric acid. The EPA asserts that PCBs and sulfuric acid do not naturally occur in crude oil. The EPA also points out that William Gurley testified that he used sulfuric acid in the rerefining process. (Appellee's Br. at 22 n.22.) The appellants have not rebutted these statements in their reply brief but rather have chosen to argue for an interpretation of the statute that is at odds with the case law we have cited above. Thus, we conclude that the waste deposited at the pit does not fit within CERCLA's petroleum exclusion.

4.

The appellants next argue that the district court erred when it included attorney fees (in the form of payroll expenses for employees of the EPA and the Department of Justice) in its award of damages. *See* 788 F.Supp. at 1483. The appellants objected to these amounts on the ground that they were attributable in part to the EPA's actions against R. A. Caldwell and Betty Gurley, both of which were dismissed, and because the EPA did not identify the portions that were attributable to the appellants. The district court overruled the objection. *Id.* at 1484. The appellants renew their argument here, contending

that the district court erred by including "expenses of $75,925.80 shown on Plaintiff's Exhibit 87 and the $13,497.33 of expenses shown on Plaintiff's Exhibit 89." (Appellants GRC & William Gurley's Br. at 46.)

A party responsible for the release of hazardous substances may be held liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(B). "The terms 'respond' or 'response' mean remove, removal, remedy, and remedial action," and these terms include "enforcement activities related thereto." *Id.* §9601(25). The Supreme Court recently held that a private party may recover attorney fees associated with identifying other potentially responsible parties. *Key Tronic Corp. v. United States*, 114 S.Ct. 1960, 1967 (1994). The Court reasoned, "Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. Key Tronic is therefore quite right to claim that such efforts significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Id.*

In this case, the objected-to attorney fees were associated with identifying R. A. Caldwell and Betty Gurley as potentially responsible parties. As such, they were a necessary part of the EPA's legitimate enforcement activities. They are not related to the EPA's status as a prevailing party in this action. The EPA's attorney fees in this case "significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of

costs." *Id.* In fact, because the EPA is the primary enforcer of CERCLA, the fees in this case arguably served a statutory purpose more so than did the fees in *Key Tronic*, where a private party sought to recover its attorney fees. *See id.* at 1965 (noting that CERCLA did not expressly authorize private actions until 1986 amendments). Thus, the district court did not err by including the objected-to amounts in its award of damages.

5.

We have fully considered the remaining issues jointly raised by the appellants, and we conclude that they are without merit.

III.

In conclusion, the district court erred when it imposed liability on the Gurley Refining Company because the EPA's action was precluded by an earlier action that was based on the same underlying facts. The district court did not err when it imposed liability on William Gurley and on Larry Gurley. The district court's judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.[3]

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[3] On January 31, 1994, counsel for the EPA filed a letter calling our attention to additional authorities, pursuant to Fed. R. App. P. 28(j). On February 4, 1994, counsel for GRC and William Gurley filed a two-page response challenging the relevance and strength of the EPA's additional authorities. Because the responsive letter does not

FLOYD R. GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I agree that the district court did not err in finding that Larry Gurley had acted as more than a mere employee of GRC. The record demonstrates that Larry Gurley had extensive authority over the company's daily operations and that he personally participated in and monitored the waste disposal process. I therefore concur in the majority's conclusion that the district court did not err in imposing liability on Larry Gurley.

However, I do not believe that the CWA action brought by the EPA in 1983 prevented it from pursuing this CERCLA action against GRC. As the majority notes, the doctrine of res judicata precludes the relitigation of a claim on grounds that were raised or could have been raised in the prior action. *Ante* at 12. Because I do not believe that the CERCLA action could have been properly raised in the prior litigation, I respectfully dissent from this portion of the majority's opinion.

The majority acknowledges that the EPA faced a statute of limitations problem in recouping expenditures from the 1978 and 1979 removal efforts at the pit, *ante* at 14-15, but concludes that the EPA could have asserted a CERCLA claim when it filed the CWA action in Decem-

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comply with Rule 28(j)'s "without argument" requirement, we strike it from the record.

ber 1983 or while that case was pending. However, the results of the EPA's feasibility study were not released until April 1986, three years after the CWA action was filed and six months after the entry of the district court's first judgment against GRC. In fact, the majority admits that "the scope of the cleanup was not known until April 1986." *Ante* at 14.

I agree with the EPA's argument that a CERCLA remedial action filed in conjunction with the CWA litigation would have been premature. Thus, I would conclude the EPA was not precluded from bringing this action against GRC and that the district court did not err in imposing liability. In all other respects, I concur in the majority's opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

In the United States District Court
Eastern District of Arkansas
Jonesboro Division
Civil No. J-C-87-291

United States of America — Plaintiff

v.

Gurley Refining Co., Inc. et al. — Defendants

Memorandum Opinion and Order

The United States brings this action pursuant to §107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a) (as amended). The United States seeks to recover the costs it has incurred to date in connection with the response activities at the Gurley Oil Pit Site ("Gurley Pit" or "Pit") in Edmondson, Arkansas. The United States also seeks a declaratory judgment of defendants' liability for all future costs to be incurred by the United States in response to future releases or threats of release at the Pits. A brief review of the undisputed facts of this case is necessary before addressing the pending motions.

In July of 1970, Gurley Refining Co., Inc. ("GRC, Inc.") leased for a ten-year period a tract of property located one mile north of Edmondson, Arkansas, from R. A. Caldwell. The purpose of the lease was to provide a disposal site for secondary oil refining wastes generated by GRC, Inc.'s used oil refinery located in West Memphis. William Gurley is the president and majority stock-

holder of GRC, Inc., which operated from 1960 through 1975.

The leased tract of land had previously been site of a clay mining plant consisting of one large pit about 1/8 mile from Fifteen Mile Bayou, a tributary of St. Francis River which flows into the Mississippi River.

GRC, Inc. utilized the property from 1970 to 1975 [illegible]posal pits for waste oil. In 1975, GRC, Inc., changed to [illegible] production of fuel oil from used oil, eliminating the need for the disposal pit. GRC, Inc. abandoned the pit in 1975.

In January, 1978, the Arkansas Department of Pollution Control & Ecology ("ADPCE") found waste oil being discharged from the pit. The Environmental Protection Agency ("EPA") investigated the problem and in July of 1978 sent an expert in oil spill cleanup to authorize expenditures from the EPA's Revolving Fund.

Cleanup of the pit was done in December 1978. A severe flood inundated the pits in April of 1979, causing oil to be discharged over a wide area south of the pits. EPA instituted a major containment, cleanup and disposal operation with regard to this oil discharge in April and May of 1979.

The United States brought an action in 1983 against R. A. Caldwell and GRC, Inc., in the United States District Court, J-C-83-299, pursuant to the Clean

Water Act, 33 U.S.C. §1321 *et seq.* for the costs incurred in removing the oil which had been discharged from the pits. The case was tried before the Honorable William Overton, who found defendants Caldwell and GRC, Inc. jointly and severally liable for violations of the Clean Water Act.

EPA evaluated the Gurley site for listing on the National Priorities List ("NPL") in 1980-1981. The site was listed on the NPL in 1982 making it eligible to receive money from the Superfund, 40 C.F.R. §300.68. The United States contends that since that date EPA has expended more than $1.8 million in investigation, remedial design and enforcement of this matter.

Congress enacted CERCLA in 1980 in response to the severe environmental and public health problems posed by the disposal of hazardous substances. CERCLA gives EPA broad authority to respond to the release or threatened release of hazardous substances into the environment. *See* S.Rep. No. 848, 96th Cong. 2d Sess. 56.

Under CERCLA, EPA has several options available to determine the most appropriate response to the problems associated with the release or threatened release of hazardous substances. Under section 106(a), 42 U.S.C §9606(a), EPA may either seek equitable relief in court or issue an administrative order requiring responsible parties to abate the releases or take other actions. The Act also created a "Superfund" to finance clean-up activities. Pursuant to section 104(a), 42 U.S.C. §9604(a),

EPA is authorized to undertake response action to abate any actual or threatened release of any hazardous substance. The United States can then recover response costs from "responsible parties" pursuant to section 107(a), 42 U.S.C. §9607(a). *See generally Developments in the Law—Toxic Waste Litigation*, 99 Harv.L.Rev. 1459, 1486 (1986).

1. The United States Motions for Partial Summary Judgment Against GRC, Inc. and William Gurley and to Strike Affirmative Defenses.

The United States has filed a motion for partial summary judgment against William Gurley and GRC, Inc. asserting that they are liable under CERCLA. In its motion for summary judgment, the United States also contends that it is entitled to summary judgment on a number of affirmative defenses defendants have raised.[1]

To establish liability under Section 107, the United States must prove that there has been a release or threatened release of a hazardous substance from a facility, that

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[1] The United States has also filed a motion to strike the affirmative defenses pursuant to Rule 12(f), in which the United States raises a number of the same arguments it raised in its motion for summary judgment.

Rule 12(f) provides that the Court may strike from any pleading "any insufficient defense." Thus, by either motion to strike the defenses or by motion for summary judgment, the United States has challenged the sufficiency of certain defenses as a matter of law. The Court, therefore, will treat the motions as one when addressing the arguments that are raised in both motions.

the release or threatened release has caused the United States to incur response costs; and that defendants fall within one of the classes of persons liable under section 107(a)(1)-(4). *United States v. Bliss*, 667 F.Supp. 1298, 1304 (E.D. Mo. 1987).

a. Res Judicata and Collateral Estoppel

Defendants argue that the United States is precluded from establishing their liability because of *res judicata* and collateral estoppel. Thus, before the Court addresses the elements of CERCLA liability, it will review the previous litigation to determine whether these defenses are applicable.

In 1983, the United States brought an action under the Clean Water Act, 33 U.S.C. §1321 *et seq.*, against R. A. Caldwell and GRC, Inc., to recover the costs of removing oil improperly discharged into navigable waters and adjoining shorelines. The case, docketed as J-C-83-399, was tried before the Honorable William Overton. By order filed October 30, 198[5], Judge Overton found Caldwell and GRC, Inc. jointly and severally liable for the discharge of oil in violation of the Clean Water Act and awarded the United States $76,758.60 for the costs it expended in removal of the oil.

Defendants argue that by virtue of the decision in *United States v. Caldwell*, the United States is precluded from arguing that anyone other than GRC, Inc. was the owner and operator of the Pit, and that any substance

other than oil and oil waste was discharged. The previous action concerned the clean up of oil that had spilled from the Pits in 1978 and 1979 into the Fifteen Mile Bayou.

Judge Overton found that GRC, Inc. had leased Caldwell's property for a ten year period and had utilized the property as a disposal pit for waste oil. Judge Overton further found that GRC rerefined used oil for sale as motor oil and dumped the waste material from its processes into the disposal pit. In 1975, GRC, Inc. switched operations and determined it no longer needed the disposal pit.

Before being granted permission to abandon the pits, ADPCE advised GRC, Inc. to install gravity drains for the discharge of the water. Judge Overton found that the pipes were not adequate to handle the discharge from the disposal pit. Thus, Judge Overton found that the pits had not been properly abandoned and GRC, Inc. remained liable for the consequences of the subsequent oil spill.

As a result of problems with the drainage system, waste oil was carried into a drainage ditch which emptied into the Fifteen Mile Bayou. Because of heavy rains in the area, the pit overflowed causing a severe emergency situation. EPA notified Caldwell and GRC, Inc. to take prompt and immediate action. EPA formulated a plan for handling the oil spill, including the containment of oil, appropriate treatment of the water, and clean up and disposal of oil and debris outside the confines of the Pit.

When GRC, Inc., indicated that it would not perform the work outlined in the plan, the EPA in July of 1978, hired a private contractor to perform the work under the supervision of EPA.

In April of 1979, flood waters inundated the disposal pit causing oil to be discharged. A major containment, clean up, and disposal operation was again instituted and lasted until May of 1979. The charges for the entire operation in 1978 and 1979 amounted to $76,758.60. Judge Overton found those charges to be reasonable. He found that the defendants were responsible for the discharge of oil in violation of the Clean Water Act; that defendants did not properly conduct removal and clean up operations of the discharged oil, and that the United States was authorized to remove or arrange for the removal of the oil.

Based on the decision in *United States v. Caldwell*, defendants argue that the United States is precluded from asserting anything other than GRC, Inc. was the operator of the facility and that oil and oil waste was disposed of by GRC, Inc.

Use of collateral estoppel is appropriate when (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given and [sic] full and fair opportunity to be heard on the adjudicated issue. *Arkla Exploration Co. v. Texas Oil & Gas*

Corp., 734 F.2d 347 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 905 (1985).

The Court finds that defendants' argument of collateral estoppel is not available in the case at bar. Here the issues of the liability of persons other than GRC, Inc. and Caldwell were never litigated. The issue of whether a hazardous substance had been released was also not litigated. *See United States v. Young*, 804 F.2d 116 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3184 (1987). Thus, the Court finds that plaintiff is not collaterally estopped from asserting that defendants are liable under CERCLA and that hazardous substances were released or are threatened to be released.

Defendants also assert that plaintiff's claim under CERCLA is barred by *res judicata*. Defendants argue that as CERCLA had been enacted in 1980, plaintiff could have and should have included its CERCLA claim in the Clean Water Act action. Defendants further argue that plaintiff was already incurring section 107 costs in 1983 when the first action was instituted and continued to incur those costs up until the case was tried in 1985.

Res judicata bars a subsequent suit based on the same cause of action where there has been a final judgment on the merits in a prior suit involving the same parties or their privies. *Kapp v. Natujrelle, Inc.*, 611 F.2d 703, 707 (8th Cir. 1979). The United States vigorously argues that *res judicata* is inapplicable here.

The previous action involved the clean up of oil that had spilled from the Pit in 1978 and 1979 and was brought pursuant to 33 U.S.C. §1321. Here, the United States attempts to recover the costs it incurred in the remediation of the Pit since 1983. The causes of action are therefore different.

Furthermore, CERCLA itself contemplates that the two actions can be brought, and the first will not bar the second. Pursuant to Section 113(g)(2), the United States may bring successive actions to recover further response costs or damages. 42 U.S.C. §9613(g)(2). Thus, according to the language of the statute, the United States did not have to bring its section 107 action at the time it brought its action under the Clean Water Act. The Court finds that this action is not barred by *res judicata*

b. Liability of William Gurley and GRC, Inc. Under CERCLA

Having determined that a determination of the issues in this matter are [sic] not precluded by *res judicata* or collateral estoppel, the Court must determine whether genuine issues of material fact exist as to the liability of William Gurley and GRC, Inc. under CERCLA.

Defendants do not appear to dispute that the Gurley Pit is a "facility" as defined in section 101(9). They contend however that the material placed in the facility was a petroleum product or fraction thereof as set forth in 42 U.S.C. §9601(14). Defendants further contend that

neither William Gurley nor GRC, Inc. was owner or operator of the Pit at the time the materials were placed in the Pit.

Under 42 U.S.C. §9601(14), a hazardous substance includes:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . , (D) any toxic pollutant listed under section 112 of the Clean Air Act . . . , and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (1) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel. . . .

The United States has submitted the affidavit of Timothy K. Underwood, Environmental Engineer with EPA, who stated that the attached documents revealed the presence of heavy metals including zinc, copper and lead in samples taken by ADPCE in 1974 and 1975. Anal-

yses of samples taken from the Pit in 1978 showed the presence [of] zinc and heavy metals. Samples taken from the Pit in 1979 revealed the presence of polychlorinated biphenyl compounds ("PCBs").

The United States also submitted the affidavit of Dr. Norman J. Weinstein, who specializes in the technical and economic aspects of petroleum and hydrocarbon products and refining. He reviewed the records in this case and concluded that hazardous substances present came from the Gurley re-refining process. Discharges from the Pit in 1974, 1975 and 1978 showed elevated lead, zinc, dissolved organics, oil and grease.

Thus, chemicals listed at 40 C.F.R. §302.4 (1986) as hazardous substances have been found in the soil adjacent to the Pit. These substances included PCBs, lead, zinc, and barium.

Defendants assert that because the United States proved that the discharges were of oil and oil waste in *United States v. Caldwell,* it cannot now claim that hazardous substances were released. As stated above, the presence of hazardous substances was not raised or litigated in the previous suit. Furthermore, if the waste material contains hazardous substances, then the waste material itself is a hazardous substance under CERCLA. *United States v. Carolawn Co.*, 21 ERC 2124, 2126 (D. S.C. 1984).

Defendants also rely on the petroleum exclusion found in §9601(14). They cite *Wilshire Westwood Associates v. Atlantic Richfield*, 881 F.2d 801 (9th Cir. 1989). In *Wilshire*, the court held that the petroleum exclusion applies to unrefined and refined gasoline, even though certain indigenous components and additives have been designated as hazardous substances under CERCLA. In particular, the court took judicial notice that benzene, toluene, xylene, ethylbenzene and lead, are hazardous substances but are all indigenous components of crude oil.

Here, defendants have not established that a genuine issue of material fact exists as to the presence of hazardous substances. In particular, defendants have not demonstrated that the substances found in the Pit and discharged (other than lead) are indigenous to oil. Furthermore, defendants have not refuted plaintiff's proof that the substances found on the site were hazardous under CERCLA.

Thus, the Court finds that the United States has established that there has been a release or threatened release of a "hazardous substance." *See United States v. Bliss*, 667 F.Supp. 1298, 1305 (E.D. Mo. 1987).

The main dispute concerns whether any of the defendants are liable under section 107(a) which provides the categories of parties who are liable. The United States contends that GRC, Inc. and William Gurley are liable as owners and operators under Sections 107(a)(1) and (a)(2).

Section 107(a)(2) makes liable "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." GRC, Inc. has admitted that it generated the wastes disposed of at the Pit. The waste products from GRC, Inc.'s refinery operations were transported or "disposed" at the Pit by GRC, Inc. employees. The Court has found that the wastes contained hazardous substances.

GRC, Inc., does not appear to seriously dispute that it was an operator or owner of the pit. It only asserts that hazardous substances were not disposed of at the time it operated the pit. This issue has been resolved against GRC, Inc., and the Court finds that it is a liable person pursuant to §9607(a)(2).

The United States contends that William Gurley is also liable under section 107(a)(2). It asserts that corporate officials who participate in the daily activities of hazardous waste disposal are personally liable. *United States v. Northeastern Pharmaceutical & Chemical Co. ("NEAPACCO")*, [sic] 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 146 (1987) (two corporate officers who arranged for the disposal of a corporation's hazardous waste found personally liable under CERCLA). *See also State of New York v. Shore Realty*, 759 F.2d 1032, 1052 (2d Cir. 1985); *United States v. Bliss*, 667 F.Supp. at 1306; *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 190 (W.D. Mo. 1985) (corporate officials who active-

ly participate in the management of a disposal facility can be held personally liable under section 107(a)).

In support of its motion for partial summary judgment, the United States has included portions of William Gurley's deposition. According to the deposition testimony, Gurley stated that he was responsible for the management of the Pit—he selected the Pit as the disposal site, he negotiated the terms of the lease with Caldwell, he supervised the design of the Pit to accommodate the wastes from the refinery, he directed the dumping of waste in the Pit.

Gurley does not dispute the assertions of the United States or offer any evidence to the contrary to demonstrate that he was not, as a corporate official, personally responsible for the daily operations of the Pit. Gurley contends, however, that he is exempt from liability as a "service station dealer, etc." 42 U.S.C. §9614(c). A "service station dealer" is defined under §9601(37)(A) as any person

> (i) who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and
>
> (ii) who accepts for collection, accumulation, and delivery to an oil recycling facility,

> recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

Nowhere does William Gurley establish that he owned or operated a retail establishment which sold, serviced or repaired motor vehicles. He states that he was owner of a Sub-chapter S corporation which collected, accumulated, and delivered recycled oil to GRC, Inc. That alone, however, does not qualify for the exception of §9601(37)(A)(i).

Gurley cannot just rest on his allegations. He must demonstrate that genuine issues of material fact exist as to his liability as an owner or operator under Section 107(a). Here, he merely asserts that he is a service station dealer. Even his assertions do not fully meet the definition set forth in the statute. The Court cannot, without more, find that Gurley is entitled to exemption from liability as a service station dealer. Thus, the Court finds that Gurley is personally liable because as a corporate official and major stockholder he was responsible for the daily management of the Pit and disposal of hazardous wastes in the Pit.

c. Affirmative Defenses

The United States argues in both its motion for partial summary judgment and its motion to strike de-

fenses that the only defenses available to defendants are those set forth in section 107(b), i.e., that the release or threatened release was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of an unrelated third party; or any combination thereof.

The courts appear to be divided on the availability of other defenses to defendants. *See e.g. United States v. Stringfellow*, 661 F.Supp. 1053, 1062 (C.D. Cal. 1987) (defendants cannot raise any affirmative defenses other than those listed in section 107(b)). *But see United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 205 (W.D. Mo. 1985) (equitable defenses available under Section 107).

A number of courts, however, have refused to read the statutory language of Section 107 as narrowly as the United States would have this Court read it. Thus, courts have read Section 107(b) as limiting the defenses to liability under the statute, but have considered constitutional challenges to CERCLA.[2] *See e.g. United States v. Monsa[n]to, Co.*, 858 F.2d 160, 173 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3156 (1989).

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[2] Even the court in *Stringfellow* noted that a number of defenses pertaining to comparative fault, negligence, failure to comply with claims procedures and the national contingency plan were not defenses to liability but rather relevant factors to consider with respect to damages. 661 F.Supp. at 1062.

In addressing the issue of availability of defenses, one commentator has stated:

> Courts appear to be mistaken in reading the "subject only" clause literally. As one court has noted, the section 107(b) defenses cannot be exhaustive, because defenses such as res judicata, payment, accord and satisfaction, statute of limitations, waiver, and laches must be available. Indeed, CERCLA itself recognizes bars to liability beyond those mentioned in section 107(b). For example, section 107(j) bars government recovery for response costs resulting from a federally permitted release, and section 112(d) imposes a three-year statute of limitations on certain claims. To read section 107(a) as precluding all defenses other than those listed in section 107(b) would directly contradict the plain language of these provisions. Rather, the legislative history of CERCLA suggests that the "subject only" clause was primarily intended to exclude defenses based on the absence of negligence.

Developments in the Law—Toxic Waste Litigation, 99 Harv.L.Rev. 1458, 1550 (1986).

The Court does not agree with the United States that all defenses other than those in section 107(b) are *per se* unavailable and must be stricken. The Court, however, need not determine the scope of affirmative defenses under CERCLA. Suffice it [to] say, even considering the appropriateness of certain defenses, those defenses dis-

cussed below are, with few exceptions, insufficient as a matter of law.

Defendants raise a number of arguments challenging the constitutionality of the statute. Defendants claim that CERCLA violates the Contracts Clause, that it violates the Due Process Clause and the Takings Clause of the Fifth Amendment of the United States Constitution, that it violates the *Ex Post Facto* Doctrine of the United States Constitution, and CERCLA is an unconstitutional tax.

The constitutional challenges have been considered by other courts and summarily rejected. *E.G., United States v. Monsa[n]to*, 858 F.2d at 173-175 (CERCLA does not violate due process and is not an *ex post facto* law); *NEAPPCO*, [sic] 810 F.2d at 734 (retroactive application of CERCLA does not violate Due Process clause and does not constitute unconstitutional taking); *United States v. Conservation Chemical Co.*, 619 F.Supp. at 213 (CERCLA does not violate Contracts Clause, is not *ex post facto* law, does not violate the Takings Clause, and the imposition of joint and several liability does not violate the Equal Protection Clause). Furthermore, this Court finds that the CERCLA liability provisions do not constitute a tax. The purpose of CERCLA is not to raise revenues, but to regulate the disposal and cleanup of hazardous waste sites.

In sum, the Court finds that the constitutional challenges asserted by defendants should be stricken as they are without merit and insufficient as a matter of law.

Defendants also contend that the action is founded in tort and therefore barred by the three year statute of limitations or alternative[ly] is founded in contract and barred by the six year statute of limitations. In addition, defendants argue that the action is not governed by the statute of limitations found in CERCLA, 42 U.S.C. §9612(d), as this action was barred prior to October 17, 1986, the date of the enactment of section 9612(d).

A number of courts have addressed the argument raised by defendants as to the applicable statute of limitations. The Court adopts the reasoning [of] *Kelley v. Thomas Solvent Co.*, 714 F.Supp. 1439, 1449-50 (W.D. Mich. 1989); *United States v. Dickerson*, 640 F.Supp. 448, 450-51 (D. Md. 1986); and *United States v. Mottolo*, 605 F.Supp. 898, 908-09 (D. N.H. 1985). That is, at the relevant time the statute of limitations of three years on cost recovery actions and six years for remediation actions was not in effect. The courts reasoned that response costs are equitable—not legal—in nature, so that a legal limitations period was not applicable and that the doctrine of laches was the only appropriate limitation on CERCLA response cost lawsuits.

However, even assuming the cost recovery action is characterized as legal as opposed to purely equitable, the case would not be barred by the six year statute of

limitations found at 28 U.S.C. §2415(a). This action was filed within about four years of the time the United States first began incurring costs for which it seeks recovery in this action. *See United States v. Mottolo*, 605 F.Supp. at 909.

Thus, the Court finds that this action is not barred by any statute of limitations and defendants' assertion of that defense is stricken.

Defendants[' arguments] that the Court does not have personal jurisdiction over them, that the complaint fails to state a cause of action, that the EPA is required to give notice under Section 112(a) and that individual liability cannot be imposed under CERCLA are all without merit and have been addressed by other courts. The Court will not further dwell on these issues, but finds that they are insufficient as a matter of law and will be stricken. Furthermore, as discussed above, the defenses of collateral estoppel and *res judicata* as well as the defense of "service station dealer" are not applicable here and they are therefore stricken.

The Court is of the opinion, however, that defendants' assertions as to the validity of the remedial plan and whether it was consistent with the National Contingency Plan ("NCP") should not be stricken. Such "defenses" are available to defendants. That is, they have the burden of proving that the response costs are inconsistent with the NCP and that EPA's choice of a response action was arbitrary and capricious.

2. Motions for Summary Judgment with regard to Larry Gurley

Larry Gurley has moved for summary judgment contending that he was only an employee at the time and cannot be found liable under CERCLA, that is he does not come within any of the four liable parties set forth in Section 107(a). The United States has filed a Motion for Partial Summary Judgment against Larry Gurley contending that Larry Gurley personally oversaw and directed the operation of the refinery and pit and is therefore liable as an operator under Section 107(a)(2).

Both parties have submitted documentation in support of their positions. The Court finds, based on the record, that genuine issues of material fact exist as to Larry Gurley's involvement in the operation and management of the Pit and therefore Larry Gurley's liability, if any.

Thus, the Court denies the motions for summary judgment.

Conclusion

In sum, the Court grants the United States' motion for partial summary judgment to the extent set forth above. That is, the Court finds that the United States has established a *prima facie* case of liability with respect to GRC, Inc. and William Gurley. The Court further grants in part and denies in part the motions to strike the af-

firmative defenses as set forth above. Finally, the Court denies Larry Gurley's motion for summary judgment and the United States' motion for partial summary judgment.

IT IS SO ORDERED this 13 day of June, 1990.

GEORGE HOWARD, JR.
United States District Judge

In the United States District Court
Eastern District of Arkansas
Jonesboro Division

Civil No. J-C-87-291

United States of America — Plaintiff

v.

Gurley Refining Co., Inc. et al. — Defendants

Memorandum Opinion and Order

The United States of America, on behalf of the United States Environmental Protection Agency (EPA), brings this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 *et seq.* to recover the costs it has incurred in connection with the response activities related to the Gurley Oil Pit Site in Edmondson, Arkansas. The United States also seeks a declaratory judgment of defendants' liability for all future costs it will incur in response to future releases or threats of release posed by the Site.

Statutory Background

CERCLA was enacted in December 1980 "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 1016(I), 96th Cong. 2d Sess. 22, *reprinted in* 1980 U.S. Code Cong. and Admin[.] News 6119, 6125. CERCLA was reauthorized and

amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), which established the Hazardous Substance Superfund (Superfund), a fund used to finance the government's response to actual or threatened releases of hazardous materials.

CERCLA authorizes the Administrator of the EPA to respond with "remedial" or other "removal" action against any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat. 42 U.S.C. §9604(a)[1]

Under the statutory scheme, EPA has various options available to determine the most appropriate response to an actual or threatened release of hazardous substances into the environment. *See U.S. v. Ottati & Goss, Inc.*, 900 F.2d 429, 433 (1st Cir. 1990) (discussion of four separate statutory paths that EPA might follow to clean up hazardous waste sites). For example, under §106(a) of CERCLA, 42 U.S.C. §9606(a), EPA may either seek equitable relief from a court or issue an administrative order requiring responsible parties to abate actual or threatened release of hazardous substances or to take other appropriate actions. Under Section 104, 42 U.S.C. §9604, EPA is authorized to undertake "response"

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[1] The statute authorizes the President of the United States to take certain actions. The President, however, has delegated most of his authority to the Administrator of the EPA. *See* Executive Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *reprinted in* 42 U.S.C. §9615 App. at 223-227 (West Supp. 1991).

activities to address the release or threatened release of a hazardous substance into the environment. Response activities include "removal" and "remedial" actions. 42 U.S.C. §9601(25).

Removal actions are short-term actions taken to halt any immediate risks posed by hazardous wastes, and include such actions as "may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment. . . . " 42 U.S.C. §9601(23). Removal actions may precede remedial action which includes relatively long-term or permanent abatement activities. 42 U.S.C. §9601(24).

In determining the appropriate response action, the Administrator "may undertake such investigations, monitoring, surveys, testing, and other information gathering" necessary to identify the existence and extent of the release or threat of release, the source and nature of the hazardous substances involved, and the extent of danger to the public health or welfare or to the environment. In addition, the Administrator may undertake a wide variety of studies or investigations necessary or appropriate to plan and direct the response actions. The Administrator may then bring an action to recover the costs incurred from those parties found to be responsible for the hazardous waste discharge. *See* 42 U.S.C. §§9604(b) and 9607(a).

Response actions must be consistent with the National Contingency Plan (NCP), which consists of EPA regulations establishing the methods and criteria for determining appropriate response to the release of hazardous substances. *See* 40 C.F.R. §300.1 *et seq.* "Before any remedial action is undertaken, the site is studied, alternatives are examined, and a preferred cleanup remedy is selected in accordance with the administrative procedures set forth in the NCP. This process results in a site-specific study called a Remedial Investigation/Feasibility Study (RI/FS). *See* 40 C.F.R. §300.430(d)-(f)." *Cooper Industries, Inc. v. U.S. E.P.A.*, 775 F.Supp. 1027, 1031 (W.D. Mich. 1991).

After providing an opportunity for public comment concerning the proposed plan, the EPA selects the remedy that it plans to implement at the site and issues a "Record of Decision" (ROD) setting forth the final remedial plan. 40 C.F.R. §300.435.

The EPA may respond to the problem by either implementing the remedial action itself, or it may seek to compel a third party to undertake the response action. If the EPA responds directly undertaking the removal or remedial action, it may then seek to recover its costs from the responsible parties. 42 U.S.C. §9607(a).

Factual Background

The Gurley Oil Pit Site is located in Crittenden County, about 1 mile north of Edmondson, Arkansas. The

site lies entirely within the watershed of the Fifteen Mile Bayou which is a tributary of the St. Francis River, which is a tributary to the Mississippi River. The site is located within the 100 year floodplain of Fifteen Mile Bayou.

The pit was excavated some time prior to 1970 when the Arkalite Company removed soils for use in aggregate production. In July, 1970, Gurley Refining Company, Inc. (hereinafter "Gurley Refining")[2] leased the pit area for a period of ten years from the landowner, R. A. Caldwell, for use as a disposal site for secondary oil refining wastes. The pit was divided into three smaller waste disposal cells when Gurley Refining installed two cross-levees in the fall of 1970.

In September of 1970, Gurley Refining obtained a waste disposal permit from the Arkansas Department of Pollution Control and Ecology (ADPC&E). From then until late 1975, Gurley Refining used the pit to dispose of sludge and filter material from the rerefining of used motor oil.

In May, 1975, an inspection by ADPC&E revealed that Gurley Refining was discharging contaminated

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[2]The EPA originally sued Gurley Refining Company, Inc.; Gurley Refining Company (a partnership); William Martin Gurley, Betty Gurley; Larry Gurley, and R. A. Caldwell. The partnership and Betty Gurley were dismissed pursuant to order dated June 15, 1990. The government subsequently settled with Caldwell. The consent decree was filed on September 25, 1991.

stormwater from the pit into Fifteen Mile Bayou without treatment. Gurley Refining was convicted on charges of permit violation and was given one year to implement site cleanup and remedial measures. In October, 1975, Gurley Refining closed part of its refining operation which generated wastes disposed at the site.

In December 1975, Gurley Refining returned its permit to ADPC&E stating that the waste disposal had ceased and that the site was secure. During 1978, personnel from the U.S. Fish and Wildlife Service reported to EPA and ADPC&E that overflows from the pit had damaged fish and waterfowl in the bayou. EPA directed work to treat and discharge the pit waters. By July of 1978, the spill was cleaned up and water levels in the pit lowered sufficiently to provide adequate capacity for further rainfall.

During April 1979, after heavy rains, the pit overflowed, releasing approximately 450,000 to 500,000 gallons of oil and oily wastes to surrounding farmlands, roads, and Fifteen Mile Bayou. EPA attempted to induce both Caldwell and Gurley Refining to conduct a cleanup operation. When they would not do so, EPA cleaned up the site under Section 311 of the Clean Water Act.

Periodic rains continued to fill the pit and pumping was required throughout the summer and fall of 1979. An inspection by ADPC&E in August, 1981, indicated that conditions at the site were essentially unchanged,

although the trench installed by EPA in 1979 had caved in.

In August, 1983, the site was listed on the National Priorities List (NPL). In December, 1983, EPA authorized a remedial investigation (RI) to determine the nature, magnitude, and extent of contamination at the site. The RI work was conducted from February 1984 until May 1985. Analyses of the results of the RI indicated the presence of a complex mixture of oil and oil waste. Numerous volatile organic and inorganic substances were found in the sludge, however, no significant level of contaminants were present in the subsurface soil samples. Organic and inorganic contaminates were present at low concentrations in the ground water. The possibility of lab contamination existed.

The Feasibility Study (FS) released April 18, 1986, contained four alternatives for the source control remedy.[3]

EPA selected the third alternative, a remedy which includes stabilization of the sludge, contaminated soil and sediment, and disposal of them in an on-site constructed

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[3]Following the source control RI/FS, EPA initiated a groundwater operable unit RI to identify background water quality. The final report of the RI/FS was issued August 1, 1988. The RI found that pit wastes have not leaked through the clay surrounding the pit. The ROD which was issued concerning the groundwater operable unit concluded that no action was necessary.

RCRA landfill. EPA estimated the cost of the remedial action to be about $6 million, which includes costs for construction of the RCRA landfill cell, stabilization of the waste, backfilling of the excavated area and construction of flood protection, and onsite treatment of contaminated water. The estimated costs also includes annual groundwater monitoring, maintenance of the monitoring walls, cell cap and flood protection.

The EPA in its Enforcement Decision Document dated October 6, 1986, found that the alternative is "a cost effective remedy that provides adequate protection of public health, welfare, and the environment." (AR 100, pg. 002327).

The United States then brought this action to recover response costs associated with the 1986 administrative decision. William Gurley, Larry Gurley and Gurley Refining ("the Gurley defendants") object to the United States' action. By order filed June 14, 1990, the Court found that the United States had established a *prima facie* case of liability with respect to Gurley Refining and William Gurley.[4] A trial was held concerning defendants' responsibility for the costs incurred by the United States.

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[4]To establish a *prima facie* case of liability under CERCLA, the United States must establish that (i) there was a release or a threat of a release of a hazardous substance at the facility; (ii) as a result of the release or threatened release, the United States incurred response costs; and (iii) the defendant falls within one of the categories of responsible parties set forth in Section 107(a)(1)-(4). *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

At trial, the Court found Larry Gurley to be a responsible party. All evidence is in, the parties have submitted post-trial briefs, and the matter is ready for decision.

The Gurley defendants raise a number of objections to the United States' cost recovery action: (1) this action is barred by *res judicata* and collateral estoppel; (2) certain evidence pertaining to costs and expenditure of attorney's fees should be stricken; (3) EPA's actions are arbitrary and capricious and the costs claimed are inconsistent with the National Contingency Plan (NCP). The Court will address each of these contentions.

Discussion

Res Judicata and Collateral Estoppel

The Gurley defendants contend that the instant action is based upon the same injuries that were litigated in an earlier proceeding. In addition, the Gurley defendants contend that based on findings in previous actions, the United States is estopped from relitigating certain issues.

The parties were involved in two lawsuits prior to the instant one. In 1979, Caldwell brought a citizen's suit pursuant to 33 U.S.C. §1365 against Gurley Refining Company, William M. Gurley, Larry M. Gurley, EPA and its Administrator, and the Secretary of the U.S. Department of Transportation. *Caldwell v. Gurley Refining Co.*, J-C-79-101. The action concerned the various problems

concerning the pits that occurred in the 1970s. Caldwell sought an injunction ordering Gurley to comply with the Federal Water Pollution Control Act ("FWPCA") and an injunction ordering the EPA to enforce the FWPCA and a declaratory judgment as to his liability for the clean-up undertaken by the EPA. Caldwell further sought against defendant Gurley specified performance of the lease agreement and damages.

The Honorable Henry Woods, U.S. District Judge for the Eastern District of Arkansas, found that the court did not have jurisdiction over a plaintiff's suit against the EPA brought pursuant to 33 U.S.C. §1365(a)(2). Thus, the court dismissed the EPA. *Caldwell v. Gurley Refining Co.*, 533 F.Supp. 252 (E.D. Ark. 1982).

Caldwell's claims for declaratory relief against Larry and William Gurley and the corporation proceeded to trial on October 3, 1983. The Court directed a verdict as to the individual claims against William Gurley and Larry Gurley. Based on the jury's responses to interrogatories, the court entered declaratory judgment in favor of Caldwell that the July 1979 lease remained in effect for its full term of ten years and that the Gurley Refining Company is responsible during that period of time for all pollution occurring to the navigable waterways of the United States and the State of Arkansas and their tributaries from operations of Gurley Refining Company at the lease site. (Defendants' Ex. 13).

The Gurley defendants contend that the court's directed verdict in favor of Larry Gurley and William Gurley as to their obligation to close the pits is *res judicata* as to all parties in this action.

The argument is without merit. The Court notes that the judgment does not contain the basis for the directed verdict. At the most it only concerns Larry Gurley's and William Gurley's obligations under the FWPCA and their obligations to perform under the lease. These are not issues in this lawsuit and there is nothing in the previous action to preclude EPA's present action under CERCLA to recover response costs.

In 1983, the United States brought an action against Caldwell and Gurley Refining Company pursuant to the Clean Water Act, 33 U.S.C. §1321 *et seq.* for the costs the EPA incurred in removing the oil that had spilled from the Pits in 1978 and 1979. *U.S. v. Caldwell*, J-C-83-399. The case was tried before the Honorable William Overton, U.S. District Judge for the Eastern District of Arkansas. By order docketed October 30, 1985, Judge Overton found Caldwell and Gurley Refining jointly and severally liable for the discharge of oil in violation of the Clean Water Act and awarded the United States $76,758.60 for the costs it expended in the removal of the oil.

The Gurley defendants assert that Judge Overton's finding that the releases were that of oil, sludge, and/or

waste oil, precludes a finding from this Court that the releases were of a hazardous substance.

The Court addressed this argument in the Court's order of June 14, 1990. The Court found that *res judicata* and collateral estoppel are not applicable in this instance. As the Court noted previously, the issues of whether a **hazardous substance** had been released was not litigated. The Court further stated:

> The previous action involved the clean up of oil that had spilled from the Pit in 1978 and 1979 and was brought pursuant to 33 U.S.C. §1321. Here, the United States attempts to recover the costs it incurred in the remediation of the pit since 1983. The causes of action are therefore different.
>
> Furthermore, CERCLA itself contemplates that the two actions can be brought, and that first will not bar the second. Pursuant to Section 113(g)(2), the United States may bring successive actions to recover further response costs or damages. 42 U.S.C. §9613(g)(2). Thus, according to the language of the statute, the United States did not have to bring its section 107 action at the time it brought its action under the Clean Water Act.

(June 14, 1990 Order at pp. 8-9)

Defendants rely on two cases decided subsequent to the June 14th Order to support their assertion that the Court should reconsider its ruling. The Court has reviewed the cases, *Johnson v. SCA Disposal Services, Inc.*,

931 F.2d 970 (1st Cir. 1991) and *Aliff v. Joy Manufacturing Co.*, 914 F.2d 39 (4th Cir. 1990), and finds that their holdings are not helpful to defendants' argument. They both involve private plaintiffs, where the first lawsuit concerned common law tort claims.

The Court is not persuaded that its original order of June 14th is incorrect, and finds that neither *res judicata* nor collateral estoppel bar this action. *See U.S. v. Fisher*, 864 F.2d 434 (7th Cir. 1988) (earlier consent decree under the Resource Conservation and Recovery Act did not bar later CERCLA action)[.]

Connected with these arguments is defendants' position that EPA has failed to demonstrate a release or threat of release other than the release in 1978 and 1979 which had already been litigated in the 1983 suit. The Gurley defendants point to the groundwater RI of 1988 in support of their position. That RI found that there had been no leaching of any materials contained in the oil sludge into the groundwater underneath the pits. The Gurley defendants further point out that in the Spring of 1989, the EPA issued an Emergency Order concerning the condition of the pit. Gurley Refining under the supervision of both the ADPC&E and EPA "dewatered" the pit, thereby alleviating the threat of any rainwater discharge from the pit.

CERCLA imposes liability on the owner and operator of a facility from which there is a release or a threatened release of a hazardous substance. 42 U.S.C.

§9607(a). A release is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of a hazardous substance. 42 U.S.C. §9601(22). In the June 14th Order the Court found that EPA had established that there was a release or threatened release of a hazardous substance at the site.

The record is replete with references to hazardous substances already present at the site (see e.g., AR Doc. 92, Endangerment Assessment). That contaminants have not been found in the groundwater does not eliminate the possibility of the threat of release. The Court finds, therefore, that EPA has established that there was a release of hazardous substances as well as a threat of release sufficient to impose liability under CERCLA. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1154 (1st Cir. 1989) ("To our knowledge, every court . . . has held that it is not necessary to prove actual contamination of plaintiff's property by defendant's waste in order to establish liability under CERCLA.")

Evidentiary Issues

Both the United States and the Gurley defendants raise a number of evidentiary issues. The Gurley defendants move to strike certain of the United States' exhibits which are cost summaries.

Defendants move to strike Plaintiff's Exhibits 87, 88, and 89, 109, 110 and 111.[5] They contend that (1) Exhibits 87, 88, 89[,] 109, 110 and 11[1] should be stricken because of the United States' failure to make the underlying exhibits available to defendants in a timely fashion; (2) Exhibits 109, 110, and 111 are irrelevant; (3) Exhibits 87, 88, 89, 109, 110 and 111 should be stricken because no foundation for the underlying documents was ever laid. The Gurley defendants also contend that Exhibit 89 was never admitted into evidence.

With respect to the last assertion, that is, the status of plaintiff's exhibit 89, the Court finds that the exhibit was admitted into evidence. At the trial, the Court provided the United States an opportunity to lay a foundation for the admission of Exhibits 87, 88, and 89 (Tr. 512). After the direct testimony of William Kime, the accountant for the Department of Justice, the Court admitted the exhibits, subject to a possible motion to strike by defendants should they succeed in discrediting the exhibits (Tr. 564).

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[5] Plaintiff's Exhibit 87 is a cost summary of Region VI EPA expenditures, Exhibit 88 is a cost summary of EPA's headquarter costs, and Exhibit 89 is a revised summary of the Environment and Natural Resource Division's costs relating to the case.

Plaintiff's Exhibits 109, 110 and 111 are the Department of Justice's expenditure and allotment reports for the fiscal years 1988, 1987, and 1989 respectively.

With respect to defendants' assertion that they did not have sufficient time to review the documents, the Court notes that the underlying documentation of the cost summaries is extensive. However, the Court is persuaded that defendants had ample opportunity to review the underlying documentation. Defendants could have engaged in more extensive discovery prior to trial. When defendants raised the timeliness issue prior to trial, the Court afforded defendants additional time to review the cost documentation and to interview witnesses prior to the commencement of the trial. Furthermore, defendants had ample opportunity to review the documentation during the 2½ month recess of the trial.

Defendants' argument concerning the relevancy of Exhibits 109, 110, and 111 is without merit. These reports were used by William Kime to calculate the indirect costs, contained in Exhibit 89. As Exhibit 89 is in evidence, the documents used by Kime as a basis for his calculations, i.e., Exhibits 109, 110, and 111, are relevant. Furthermore, Phillip B. Stiness, testified as to the accuracy and reliability of Exhibits 109-111.

Defendants' primary argument is that the exhibits should be stricken as the United States failed to lay the proper foundation for admissibility of these cost summaries. That is, defendants argue, the summaries are based on inadmissible hearsay. *See Ford Motor Co. v. Auto Supply Co.*, 661 F.2d 1171, 1175 (8th Cir. 1981) ("A summary, if drawn from data that is inadmissible, likewise must be excluded.")

The United States argues that the underlying documents are admissible under the public records exception to the hearsay rule. Federal Rule of Evidence 803(8) provides that "[r]ecords, reports . . . or data compilations in any form, of public offices or agencies setting forth (A) the activities of the office or agency or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . " are not excluded by the hearsay rule.

The Court finds that the United States has met its burden to establish that the underlying documents are public records by demonstrating that the reports are from a public agency reflecting its work and there was a duty to report or prepare the documents. In particular, the NCP mandates that the EPA complete and maintain documents to support its action and to form the basis for cost recovery. According to 40 C.F.R. §300.160 (1991): "[D]ocumentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state, or private party costs incurred for response actions. . . . "

The Court finds that the cost summaries are admissible, and that the United States has provided adequate documentation to support its claim for costs. *See U.S. v. Bell Petroleum Services, Inc.*, 734 F.Supp. 771, 781 (W.D. Tex. 1990).

Defendants argue in the alternative that if Exhibit 87 is not stricken, then attorneys' fees incurred by the United States in prosecuting this action should not be included as part of the costs. In particular, the Gurley defendants point to the order dismissing Betty Gurley and Gurley Refining Company, a partnership, stating that "the parties shall bear their own costs and attorney's fees in this matter." Defendants assert that because the United States can not determine what portion of its costs are directly attributable to preparing its case against the dismissed defendants, the Court should strike the United States' claim for all attorney's fees. The Court will address this argument later when discussing costs.[6]

Recovery of Costs

Pursuant to Section 107(a)(4)(A) of CERCLA, defendants are liable for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(A).

Defendants have the burden of showing the United States' response costs are inconsistent with the NCP. Those response costs not inconsistent with the NCP are

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6. The Court reserved a number of rulings pertaining to evidentiary issues. In its post-trial brief, EPA renews its objections to some portions of Michael Bates' testimony, and to testimony outside the administrative record. To the extent a discussion of these evidentiary issues is necessary, the Court will address them below.

conclusively presumed to be reasonable and therefore recoverable. *U.S. v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 747 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("NEPACCO").

Furthermore, in order to avoid liability for response costs, defendants must demonstrate that the EPA's choice of response action was arbitrary and capricious or otherwise not in accordance with law based on the administrative record. 42 U.S.C. §9613(j)(2). *See NEPACCO*, 810 F.2d at 748 ("Because determining the appropriate remedial and removal action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA. The applicable standard of review is whether agency's choice is arbitrary and capricious.")

In reviewing the administrative record, the Court should not attempt to substitute its judgment for the expertise of EPA officials. The Court's role, "as the CERCLA statute makes clear, is one of review on the administrative record, searching for errors of procedure and for glaring omissions or mistakes which indicate that EPA has acted arbitrarily and capriciously." *U.S. v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1424-25 (6th Cir. 1991).

The Gurley defendants assert that the proposed remedial action is arbitrary and capricious. In support of their position, they point to the fact that the ADPC&E did not agree to the proposed remedial action, and con-

sidered it not cost-effective and too extensive.[7] The state did not formally object in 1986 to the proposed remedy; instead it conveyed its concerns orally.[8]

ADPC&E began to object more vigorously to the proposed remedial action in 1988 after the RI/FS of the ground water operable unit and release of the design analysis by the U.S. Army Corps of Engineers. ADPC&E continued to contend that the proposed remedy was not cost-effective and further maintained that the proposed remedial action was not protective of the health and environment because of the possibility [of] ground water contamination and the likelihood of hazardous air emissions (See, e.g., Plaintiff's Exhibits 21, 30, 31, 32, Tr. 989, 1114-1115). Instead of a RCRA vault, ADPC&E proposed that the pit water be treated, the remaining waste solidified,

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[7] Defendants also assert that EPA used flawed information in evaluating the Gurley site for listing on the NPL. According to defendants, EPA ignored advice by ADPC&E concerning the ranking of the site, and that its refusal to use correct data is arbitrary and capricious.

The designation of the site on the NPL cannot be challenged by defendants at this late date. 42 U.S.C. §9613(a), and the manner in which the site was evaluated and ranked cannot be used as an example of arbitrary and capricious action justifying the denial of costs under §9613(g)(2).

[8] At trial, Michael Bates, Chief of the hazardous waste division of ADPC&E, testified that the State did not submit written comments because based on past dealings, the State believed that EPA would ignore the State's concerns. The record reflects, however, that EPA was aware of the State's specific concerns. (AR Doc. 100, pg. 002327).

and capped in place with native clays (Plaintiff's Exhibit 30).

The Court is of the opinion that the dispute between ADPC&E and EPA is basically one of difference of opinion concerning the appropriate removal and remedial action. The Court is not persuaded that the EPA's choice is arbitrary and capricious. Defendants as well as the ADPC&E had ample opportunity to voice their opinions. The Court will not second guess the technical expertise of EPA. The record supports its decision.[9]

In furtherance of their position, defendants also point to the fact that the State had consistently refused to enter into a contract or cooperative agreement with EPA

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[9] In rebuttal, the United States called a chemist, Dr. Soundararajan, to testify concerning the remedy proposed by ADPC&E, that is, the use of Class C fly ash to solidify the waste (Tr. 1283-1275) [sic]. Defendants then attempted to rebut the testimony of Dr. Soundararajan with their own scientists (Surrebuttal testimony of Dr. John Smith, Dr. William Zuber, John Michael Hinds, November 13, 1990 and Dr. Daniel R. Marks, November 14, 1990). This testimony is, of course, outside the administrative record, and beyond the scope of review. However, the opinions of these "experts" merely demonstrate that courts should refrain from delving into highly technical areas; the decisions concerning appropriate actions are best left to those having the technical expertise and knowledge in the field.

as required by 42 U.S.C. §9604.[10]

Section 104(c)(3) bars expenditures from the Superfund for remedial actions unless the state enters into a cooperative agreement with the federal government. However, a number of courts have held that liability under Section 107(a) is independent of the authorized uses of the Fund and separate from the cooperative agreement required in Section 104(c)(3). That is, a cooperative agreement with the state is not a prerequisite for a cost recovery action brought pursuant to Section 107(a). *See U.S. v. Kramer*, 757 F.Supp. 397, 421 (D. N.J. 1991); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 208 (W.D. Mo.. 1985); *United States v. Wade*, 577 F.Supp. 1326, 1335-36 (E.D. Pa. 1983).

Thus, the failure of the State to enter into a cooperative agreement with EPA does not bar recovery of costs by EPA. It is not an indication that the response actions are arbitrary and capricious. At the most, the lack of a cooperative agreement supports the Court's conclusion that the dispute between ADPC&E and EPA was a technical one concerning the appropriate remedy.

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[10]By letter dated September 7, 1990, the ADPC&E and EPA reached agreement on the remedy to be implemented at the Gurley Oil Pit Site. ADPC&E now agrees to a RCRA vault, however, the design of the vault will be modified to address the State's concerns. (Plaintiff's Exhibit 117).

Furthermore, that the United States continued to incur costs despite the opposition of the state does not establish that the United States should not recover its costs. Certainly, CERCLA does not contemplate that EPA remain idle in the face of serious threats to health and the environment. As mandated by the statute, EPA moved forward to develop a plan to deal with the problems at the Gurley site. That it did so in the face of opposition by the state does not warrant a finding that the EPA's actions are arbitrary and capricious.[11] Furthermore, that the remedy proposed is more expensive than one proposed by the state, or more expensive than defendants desired, does not warrant to a finding that the action is not cost-effective or the costs incurred are inconsistent with the NCP.

Finding that the costs are consistent with the NCP and that the action is neither arbitrary nor capricious, the Court must determine what costs the United States can recover. The statute provides that the United States is entitled to all costs not inconsistent with the NCP. 42 U.S.C. §9607(a). Thus, the United States is entitled to all costs of administrative, investigative, construction, and enforcement activities incurred in connection with the

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[11] Steve Gilrein, an EPA employee who has been responsible for the Gurley Pit site since 1987, testified that the EPA had a number of meetings with state personnel to discuss the design. EPA was aware of the state concerns, but believed that the EPA had a verbal commitment from the ADPC&E to provide the state ten percent match prior to contracting with the Corps of Engineers to do the design. (Tr. 356-360).

site. 42 U.S.C. §9604(b). *See e.g., U.S. v. Bell Petroleum Services, Inc.*, 734 F.Supp. 771 (W.D. Tex. 1990) (United States entitled to indirect costs, litigation expenses, entire amount of feasibility study costs, prejudgment interest as of the date the cost accrued); *U.S. v. Hardage*, 733 F.Supp. 1424, 1432 (W.D. Okla. 1989) (United States could recover investigative costs, litigation costs, but question of fact as to whether United States entitled to indirect costs); *NEPACCO*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (government's response costs include investigations, monitoring and testing; planning and implementation of response action, and costs, including salaries and expenses, incurred associated with these activities)[.]

The United States presented evidence of the costs it has incurred in connection with its response activities as of February, 1990. The following is a summary of the costs incurred:

> a. Payroll expenses of EPA headquarters employees in the amount of $1[,]317.09;
>
> b. Payroll expenses of Region VI employees of $75,649.33;
>
> c. Travel expenses of Region VI employees of $10,050.80;
>
> d. Payments to CH2MHill pursuant to contract work in the amount of $363,255.14 pursuant to Contract No. 68-01-6692, Work

Assignment No. 98-6139.0, and $305,270.00 in payments to CH2MHill for response activities conducted pursuant to EPA Contract No. 68-01-7251, Work Assignment No. 134-6139;

e. Payments to TechLaw pursuant to contract work in the amount of $47,926.25;

f. Payments to Jacobs Engineering Group, Inc. in the amount of $28,855.79 for contract work;

g. Payments to Viar and contract laboratories participating [in] the EPA's Contract Laboratory program in the amount of $99,353.27;

h. Payments to Peer Consultants in the amount of $3,157.90 for contract work;

i. Payments to the State of Arkansas pursuant to Cooperative Agreement No. 646201 in the amount of $28,258.24;

j. Payments to the Department of Interior pursuant to an interagency agreement in the amount of $2,613.00;

k. Payments to the Army Corps of Engineers pursuant to an interagency agreement in the amount of $570,076.32;

l. Payments to the National Enforcement and Investigation Center (NEIC) in the amount of $6,878.87;

m. Payroll Expenses for responses activities conducted at the site by Department of Justice (DOJ) personnel in the amount of $13,472.80;

n. Costs of at least $2,440.85 in other direct costs for response activities conducted at the site by DOJ personnel;

o. Indirect costs in the amount of $28[,]404.89 for activities performed by DOJ personnel;

p. Indirect costs in the amount of $201,839.50.

In total, the United States seeks response costs in the amount of $1,786,502.92 for costs incurred as of February 28, 1990. The Court notes that while defendants argue in general that EPA's choice of response action is arbitrary and capricious, and that the costs are inconsistent with the NCP they do not point to any particular cost as not a proper response cost.

As noted above, the Gurley defendants assert that the United States is not entitled to attorney's fees based on the language of the order dismissing Betty Gurley and the partnership. That order provided that "the parties shall bear their own costs and attorney's fees in this matter." Defendants assert that because the United States could not establish the exact amount of costs attributable to the prosecution of the case against the dismissed defendants, all attorney's fees should be excluded.

The majority of courts have imposed joint and several liability in cases under §107 unless the defendants are able to establish that a reasonable basis exists for apportioning the harm among them. *United States v. Wade*, 577 F.Supp. 1326, 1338 (E.D. Pa. 1983). *See also United States v. R. W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (While CERCLA does not mandate the imposition of joint and several liability; it permits it in cases of indivisible harm); *United States v. Monsanto*, 859 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (CERCLA has been interpreted to impose joint and several liability); *Kelly v. Thomas Solvent Co.*, 714 F.Supp. 1439, 1448 (W.D. Mich. 1989) (where two or more defendants are responsible for an indivisible harm, each is subject to liability for the whole harm).

In this instance the harm is indivisible. That the United States agreed to waive its claim for attorney's fees with respect to the dismissed defendants does not excuse the remaining defendants from their responsibility for attorney's fees. The Court finds that the remaining Gurley defendants are jointly and severally liable for all costs, including attorney's fees.

A review of the costs incurred may lead one to surmise that they are excessive. Indeed, much money has been spent determining the remedy; the remedy, however, has yet to be implemented. Despite the seeming enormity of the costs incurred, the Court must conclude that the United States is entitled to recover them. As one

district court perhaps a little forcefully stated:

> Taking a broader look at the purposes behind CERCLA, the Court does not find therein Congress' desire to allow a responsible party to sit back and watch the Government sift through the rubble of a polluted site, formulate a remedial solution and take action and then attack every cost associated therewith. This Court is of the opinion gross misconduct on the part of the Government should bar recovery. Yet the Court keeps in mind the fact the wrongdoers herein had the option of taking responsibility for their own actions at the outset, which, had they done so, would unquestionably have limited certain costs. Our Government, God bless her, is a bureaucratic monster which, by definition, runs inefficiently. . . . Many, many costs would have been unnecessary had the Defendants shouldered the burden and sought to quickly and efficiently clean up the mess they made. Instead, their free ride has increased costs exponentially, including all the bureaucratic expenses typical of a large Government, costs of discovery and trial, Court costs . . . the list is unending.

U.S. v. Bell Petroleum, 734 F.Supp. at 780-81.

In sum, the Court finds that the United States is entitled to recover costs as set forth above in the amount of $1,786,502.92 for costs incurred to February 28, 1990.

CERCLA also authorizes recovery of prejudgment interest. 42 U.S.C. §9607(a) ("The amounts recoverable

in an action under this section shall include interest on the amounts recoverable. Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned.") Here, there is no indication when any specific amount was demanded. Indeed, the total amount claimed was not made known to defendants until the conclusion of the United States' case in chief. Thus, the Court will award prejudgment interest from September 10, 1990, or the date the United States rested with respect to its cost recovery action.

The United States also seeks a declaratory judgment of the liability of the Gurley defendants for future response costs associated with the Gurley site. 42 U.S.C. §9613(g)(2) (in an action for recovery of costs, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or action to recover further response costs or damages.") *See U.S. v. Alcan Aluminum Corp.*, 755 F.Supp. 531, 543 (N.D. N.Y. 1991) (court enters declaratory judgment in plaintiffs' favor that defendant liable to plaintiffs for future response cost associated with the site); *U.S. v. Hardage*, 733 F.Supp. 1424, 1439 (W.D. Okla. 1989) (while the Court cannot award costs until they are incurred, the Court can determine liability for future response costs). Thus, the Court grants the United States' request for declaratory judgment in its favor and against defendants with respect to liability for future response costs.

Conclusion

In sum, the Court finds that the Gurley defendants are jointly and severally liable to the United States for $1,786,502.95 for costs incurred in connection with response activities at the Gurley Pit Site as of February, 1990; prejudgment interest at the statutory rate from September 10, 1990. Declaratory judgment is also entered in favor of the United States and against defendants for future response costs to be incurred at the Gurley Pit Site. Judgment will be entered accordingly.

IT IS SO ORDERED this 26 day of March, 1992.

GEORGE HOWARD, JR.
United States District Judge

In the United States District Court
Eastern District of Arkansas
Jonesboro Division
Civil No. J-C-87-291

United States of America — Plaintiff

v.

Gurley Refining Co., et al. — Defendants

Amended Judgment

Pursuant to the Memorandum Opinion and Order entered March 27, 1992, judgment is entered in favor of plaintiff and against defendants in the amount of $1,786,502.95 for costs incurred in connection with the response activities at the Gurley Pit Site as of February 28, 1990; plaintiff is entitled to prejudgment interest at the statutory rate from September 10, 1990. Declaratory judgment is also entered in favor of plaintiff and against defendants with respect to liability for future response costs to be incurred at the Gurley Pit site. The cross-claim of R. A. Caldwell is dismissed in its entirety.

ENTERED this 28th day of April, 1993.

GEORGE HOWARD, JR.
United States District Judge

United States Court of Appeals
for the Eighth Circuit

No. 93-2702EAJ

United States of America, *Appellee*,

v.

Larry Gurley et al, *Defendants*,.

Gurley Refining Company, etc., et al., *Appellants*

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 9, 1995

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U. S. Court of Appeals, Eighth Circuit

In the United States District Court
Eastern District of Arkansas
Jonesboro Division
Civil Action No. J-C-87-291

United States of America,

Plaintiff,

v.

Gurley Refining Company, Gurley Refining Co., Inc., R. A. Caldwell, William Martin Gurley, Betty Gurley and Larry Gurley

Defendants.

Complaint

Plaintiff, United States of America, at the request of the Administrator of the United States Environmental Protection Agency (hereafter "EPA") alleges:

Preliminary Statement

1. This is a civil action brought pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereafter "CERCLA"), 42 U.S.C. §9607(a) (as amended), for the reimbursement of response costs incurred by the United States in response to the release or threat of release of hazardous substances from waste oil disposal pits in Edmonston, Arkansas (hereinafter "Gurley site").

Jurisdiction and Venue

2. This court has jurisdiction pursuant to 28 U.S.C. §1345 and 42 U.S.C. §§9607 and 9613(b).

3. Venue is properly in this Court pursuant to 28 U.S.C. §1391(b) and 42 U.S.C. §9613(b).

Defendants

4. Mr. R. A. Caldwell is the owner of the property on which the Gurley site is located.

5. Gurley Refining Company is a partnership doing business in Arkansas. During the period 1970 through 1980, Gurley Refining Company leased the land from R. A. Caldwell and disposed of the waste oils at the Gurley site.

6. Gurley Refining Co., Inc., is a corporation incorporated under the laws of the State of Arkansas that does business in West Memphis, Arkansas. On information and belief, Gurley Refining Company, Inc. generated wastes that were disposed of at the Gurley site and either transported or arranged for transportation of wastes to the site and the ultimate disposal of the wastes at the Gurley site.

7. On information and belief, William Martin Gurley, is President of and principal shareholder in Gurley Refining Co., Inc. a, and partner in Gurley Refining

Company. William Gurley, at all times relevant herein, was responsible for the conduct and management of the Gurley site. William Gurley controlled the affairs and activities of Gurley Refining Company, Inc., and Gurley Refining Company.

8. On information and belief, Betty Gurley, is Vice President and Secretary of and principal shareholder in Gurley Refining Co., Inc., and partner in Gurley Refining Company. Betty Gurley assisted in the operation of the used oil refining process at the Gurley site.

9. Larry Gurley, is partner in Gurley Refining Company and assisted in the operation of the used oil disposal process at the Gurley site.

General Allegations

10. The Gurley site consists of 3.25 acres, located approximately 1.2 miles north of Edmonston, Arkansas, Prior to 1970, the site consisted of one large pit, approximately 750 feet by 250 feet and between 9-15 feet in depth. South and downgradient of the site by approximately one-eighth of a mile is the Fifteen Mile Bayou, a tributary to the St. Francis which flows into the Mississippi River.

11. In 1970, Gurley Refining Company and Gurley Refining Co., Inc., obtained a permit from the Arkansas Department of Pollution Control and Ecology (ADPC&E) to use the pit for waste disposal. Subsequent-

ly the defendants divided the pit into three cells, running north to south.

12. During the period October 1970 through late 1975, the defendants filled the pits with waste material, consisting of oil sludge and filter material from the used oil refinery processes operated by the Gurley Refining Co., Inc.

13. The waste material in the pits contains, *inter alia*, polychlorinated biphenyls (PCBs) and heavy metals including lead, barium, zinc and nickel. The pits also contain water that is contaminated with the waste material.

14. PCBs and heavy metals are hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

15. During the period 1976 through 1980, increased amounts of storm water caused the waste material in the pits to overflow the sides and enter Fifteen Mile Bayou.

16. In 1980, the Gurley site was evaluated for listing on the National Priorities list.

17. In December 1982, the Gurley site was added to the National Priorities List. As a result of the listing, EPA was authorized to spend monies from the fund established pursuant to CERCLA, at the site for remedial or removal actions.

18. In February 1983, the EPA contacted R. A. Caldwell and Larry Gurley of Gurley Refining Company to inquire if either would be interested in performing a Remedial Investigation and Feasibility Study (RI/FS) at the Gurley site to determine the extent of contamination of the site and propose a method of cleanup. Negotiations continued until September 1983 without final agreement between the parties. Thereafter, the EPA undertook the task of preparing the RI/FS.

19. To date the United States has incurred in excess of $405,946.17 for remedial actions taken at the Site.

20. The United States is continuing to incur, and will continue to incur further response costs, including those under 42 U.S.C. §9607(a)(4)(b) at the Gurley site.

Claim for Relief

21. Section 107(a) of CERCLA, 42 U.S.C. §9607(a) provides in pertinent part:

> **107(a)**—Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner or operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arrangement for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites elected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan; . . .

22. The term "facility" is defined in Section 101(9) of CERCLA, 42 U.S.C. §9601(9) as

(A) any building, structure, installation equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any

consumer product in consumer use or any vessel;

23. The Gurley site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. §9601(9).

24. "Hazardous substance" is defined by Section 101(14) of CERCLA, 42 U.S.C. §9601(14), to include

> (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to Section 102 of the Act, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under Section 307(a) of the Federal Water Pollution Control Act, (E) any hazardous air pollutant listed under Section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the administrator has taken action pursuant to Section 7 of the Toxic Substances Control Act.

25. "Release" is defined in Section 101(22) of CERCLA, 42 U.S.C. §9601(22), as

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leach-

ing, dumping, or disposing into the environment, . . .

26. At relevant times, a release or substantial threat of a release of hazardous substances occurred at the Gurley site.

27. The materials in the pits at the Gurley site are "hazardous substances" within the meaning of Section 101(14), 42 U.S.C. §9601(14).

28. The United States has incurred costs for actions taken in response to the release or threat of release of hazardous substances from the Gurley site.

29. The United States' actions concerning the Gurley site constitute "remedial" actions as defined by Section 101(24) of CERCLA, 42 U.S.C. §9601(24).

30. The United States' remedial actions concerning the Gurley site were not inconsistent with the National Contingency Plan.

31. Defendants R. A. Caldwell, Gurley Refining Company, Gurley Refining Co., Inc., William Martin Gurley, Betty Gurley, and Larry Gurley were, at the time of disposal of the hazardous wastes, the operators of the Gurley site at which hazardous wastes were disposed or the generators of the hazardous waste or both.

32. Defendant R. A. Caldwell is liable under Section 107(a)(1), 42 U.S.C. §9601(a)(1), to the United States for the cost of the remedial actions that the United States has taken at the Site.

33. Gurley Refining Company and Gurley Refining Company, Inc., William Martin Gurley, Betty Gurley, and Larry Gurley are liable under Section 107(a)(2)(3) of CERCLA, 42 U.S.C. §9607(a)(2)(3), to the United States for the cost of the remedial actions it has taken at the site.

34. The defendants are also liable under Section 107(a) of CERCLA, 42 U.S.C. §9607(a), for the costs the United States will incur pursuant to Section 104(b) of CERCLA, 42 U.S.C. §9604(b), to recover the costs of the remedial action it has taken concerning the site.

Prayer for Relief

WHEREFORE, the United States prays that this Court:

1. Enter judgment against the defendants, jointly and severally, in favor of the United States for all costs incurred and to be incurred by the United States in response to the release or threat of release of hazardous substance at the Gurley site, plus interest, which costs are currently in excess of $405,946.17;

2. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

ROGER J. MARZULLA
Acting Assistant Attorney General
Land and Natural Resources Division

CRAIG E. JOHNSON
Attorney
Environmental Enforcement Section
United States Department of Justice

CHARLES A. BANKS
United States Attorney
Eastern District of Arkansas

By: A. DOUG CHAVIS
Assistant United States Attorney
Eastern District of Arkansas

In the United States District Court
Eastern District of Arkansas
Jonesboro Division
Civil No. J-C-87-291

United States of America — Plaintiff

v.

Gurley Refining Company, Gurley Refining Co., Inc., William Martin Gurley, Betty Gurley and Larry Gurley — Defendants

Second Amended and Supplemented Answer of Gurley Refining Company, Gurley Refining Co., Inc., William Martin Gurley, and Betty Gurley

Comes now Gurley Refining Company, Gurley Refining Co., Inc., William Martin Gurley, and Betty Gurley, by and through their attorneys for their second amended and supplemented answer to the complaint filed herein, and do state as follows:

1. While denying that costs have been incurred in response to the release or threat of release of hazardous substances, admit that this is a civil action brought pursuant to §107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter "CERCLA"), 42 U.S.C. §9607(a) (as amended), for the reimbursement of response costs allegedly incurred by the United States in response to the alleged

release or threat of release of alleged hazardous substances from waste oil disposal pits in Edmondson, Arkansas (hereinafter "Gurley Site").

2. Admit that this court has subject matter jurisdiction pursuant to 28 U.S.C. §1345 and 42 U.S.C. §§9607 and 9613(b).

3. Admit that venue is proper in this court pursuant to 28 U.S.C. §1391(b) and 42 U.S.C. §9613(b).

4. Admit that R. A. Caldwell is the owner of the property on which the Gurley Site is located.

5. Admit that Gurley Refining Company is a partnership doing business in Arkansas. Deny that during the period 1970 through 1980 Gurley Refining Company leased the land from R. A. Caldwell or disposed of the waste oils at the Gurley Site.

6. Admit that Gurley Refining Co., Inc. is a corporation incorporated under the laws of the State of Arkansas. Deny that Gurley Refining Co., Inc. presently does business in West Memphis, Arkansas or elsewhere. Admit that Gurley Refining Co., Inc. generated wastes that were disposed of at the Gurley Site and transported or arranged for the transportation of waste to the site and the ultimate disposal of waste at the Gurley Site. (The word "waste" is used in this paragraph in its broad sense and not as defined by CERCLA.)

7. Admit that William Martin Gurley is president of and principal shareholder in Gurley Refining Co., Inc. and is a partner in Gurley Refining Company, a partnership. Deny that William Martin Gurley, in his individual capacity, was at any time responsible for the conduct and management of the Gurley Site. Deny that William Martin Gurley, in his individual capacity, at any time controlled the affairs or activities of Gurley Refining Co., Inc. Admit that William Martin Gurley, as a partner in Gurley Refining Company, controlled in part the affairs and activities of Gurley Refining Company, a partnership.

8. Admit that Betty Gurley is vice-president and secretary of Gurley Refining Co., Inc. Admit that Betty Gurley is a shareholder in Gurley Refining Co., Inc., though she owns less than a controlling interest. Admit that Betty Gurley is a partner in Gurley Refining Company. Deny that Betty Gurley, in her individual capacity, assisted in the operation of the used oil refining (actually re-refining) process at the Gurley Site.

9. Admit that Larry Gurley is a partner in Gurley Refining Company. Deny that Larry Gurley, in his individual capacity, assisted in the operation of the used oil disposal process at the Gurley Site.

10. Admit that the Gurley Site consists of 3.25 acres, more or less, located approximately 1.2 miles north of Edmondson, Arkansas. Admit that prior to 1970 the site consisted of one large pit approximately 750 feet by 250 feet and between nine to fifteen feet in depth. Admit

that south and downgradient of the site by approximately 1/8 of a mile is the Fifteen Mile Bayou, a tributary to the St. Francis River which flows into the Mississippi River.

11. Admit that Gurley Refining Co., Inc. obtained a permit from the Arkansas Department of Pollution Control and Ecology to use the pit for waste disposal, though the exact year in which such permit was obtained is not known at present. Admit that Gurley Refining Co., Inc. subsequent to 1970 divided the pit into three cells running north to south. Deny that Gurley Refining Company, William Martin Gurley, Betty Gurley, or Larry Gurley divided the pit into three cells running north to south subsequent to 1970. Deny that in 1970 Gurley Refining Company obtained a permit from the Arkansas Department of Pollution Control and Ecology to use the pit for waste disposal.

12. Admit that during the period beginning October 1970 and ending in 1975, Gurley Refining Co., Inc. placed into the pits material from its oil refining (actually re-refining) process operated by Gurley Refining Co., Inc. Deny that such material constituted waste material, oil sludge or filter material as defined by CERCLA. Deny that Gurley Refining Company, William Martin Gurley, Betty Gurley, and/or Larry Gurley placed any materials in the pits at any time.

13. For lack of information upon which to base a reasonable belief at this time, deny that the waste material in the pit contains, *inter alia*, polychlorinated biphenyls

(PCBs) and heavy metals including lead, barium, zinc and nickel and further deny that the pit also contains water that is contaminated with the waste material.

* * *

therein, can therefore not be in any way liable to the United States of America in this cause.

37. Gurley Refining Co., Inc. by way of further affirmative defense states that in cause No. J-C-83-399 formerly pending in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, the United States of America brought suit pursuant to the Clean Waters Act as set forth in 33 U.S.C. §1321 *et seq.* to recover from Gurley Refining Co., Inc. removal costs of discharges from the Gurley Site; that a judgment was entered in said cause; that the issues and claims in the present cause are ones which were litigated or which could have been litigated in the former cause; and that the United States of America is estopped under the principle of res judicata from pursuing the instant cause as against Gurley Refining Co., Inc.

38. By way of further affirmative defense, William Martin Gurley, Betty Gurley, and Larry Gurley, defendants, state that the afore-referenced judgment entered in cause No. J-C-83-399 formerly pending in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, estops the United States of America under the principles of res judicata from litigating the in-

stant cause of action against these defendants, or any of them, since such issues are ones which were raised or which could have been raised in the afore-referenced former cause and since William Martin Gurley, Betty Gurley and Larry Gurley are and were in privity with Gurley Refining Co., Inc. in the following respects:

(a) William Martin Gurley, Betty Gurley and Larry Gurley were officers or agents of Gurley Refining Co., Inc.;

(b) William Martin Gurley and Larry Gurley managed, conducted, and participated in the afore-referenced former litigation; and

(c) William Martin Gurley and Betty Gurley are, and at all times relevant hereto have been, the sole stockholders in Gurley Refining Co., Inc., a closely held corporation.

39. By way of further affirmative defense, these defendants state that:

(a) This cause of action is one founded upon a contract implied in law or fact and is barred by the six year limitation of action set forth at 28 U.S.C. §2415(a); or

(b) Alternatively and only in the event that it should be found that this cause of action is not one founded upon a contract implied in law or fact, then the

cause of action is one founded upon a tort and is barred by the three year limitation set forth in 28 U.S.C. §2415(b); and

(c) In either event, the limitation set forth in 42 U.S.C. §9612(d) as amended on October 17, 1986 is not applicable to this cause of action because the cause of action was barred prior to October 17, 1986 by the applicable statute of limitation set

* * *

44. The pits upon the Gurley Site contain rain water which, due to storm water accumulations, caused a discharge (not of waste material but of storm water) from these pits into Fifteen Mile Bayou between the years 1976 and 1980. The plaintiff sued Gurley Refining Co., Inc. as an "Operator" under the Clean Water Act (33 U.S.C. §1321, *et seq.)* for said discharges and obtained a judgment against the defendant. The plaintiff was recently advised by representatives of Gurley Refining Co., Inc. (through the State of Arkansas) that there was a probability of a "Release" from the Gurley Site as defined in 42 U.S.C. §9601(22) because of the breached integrity of the south berm of the pits. Whereupon, plaintiff directed the State of Arkansas to assume the role of "lead agency" so as to alleviate the threat of a substantial endangerment to the environment by way of such a release. The State of Arkansas, in conjunction with the defendant, Gurley Refining Co., Inc., moved onto the Gurley Site; and Gurley Refining Co., Inc. is presently treating and decanting the

rain water so as to relieve the danger of a release, all of which is being done pursuant to and consistent with the National Contingency Plan but not pursuant to the flawed RI/FS referred to in paragraph 43 hereof since that RI/FS called for a decantation of the storm water in a manner "inconsistent" with the NCP.

45. The plaintiff, on behalf of "the President," has provided for a "flawed" remedial action pursuant to 42 U.S.C. §9604(c)(3), despite the fact that the State of Arkansas (in recognition of the fact that the RI/FS prepared by or at the direction of the EPA was inconsistent with the NCP) has consistently refused to assure the plaintiff of a "10 per centum of costs of remedial action . . . ", per 42 U.S.C. §9604(c)(3). Thus, the claim on behalf of the plaintiff as to the already expended monies for an RI/FS and for future costs to be expended inconsistent with the NCP and pursuant to a flawed RI/FS is in violation of 42 U.S.C. §9604(c)(3) and therefore constitutes actions arbitrary and capricious and not in accordance with the law.

46. The administrative record (which has just been certified to this Court by the plaintiff apparently in violation of 42 U.S.C. §9604(c)(3)) fails to recognize that the proposed decantation of the storm water in the pits (which has almost been completed by defendant, Gurley Refining Co., Inc., in a manner consistent with the NCP) and the subsequent proposed remedial action on waste in the pit will in fact, because of the basic inconsistency with the NCP, expose the environment and members of neighboring households to the threat of release of noxious

odors and the probable evacuation of their homes for a substantial period of time. Neither of these possibilities are expressed in the "flawed" RI/FS nor have those possibilities been subject of a public hearing attended by those persons who may be exposed to odors or evacuated. The foregoing failure is arbitrary and

* * *

the response action, as evidenced by the "flawed" RI/FS, is arbitrary and capricious and that the damages claimed to date by the plaintiff should not be awarded in light of the admonitions of 42 U.S.C. §9613(j)(3).

48. Defendants, William M. Gurley and Betty Gurley, allege that the plaintiff herein in the case of *United States of America v. R. A. Caldwell and Gurley Refining Company*, being No. J-C-83-399 in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, has previously sued the defendant Gurley Refining Company [sic] Gurley Refining Co., Inc., and established by a judicial order that Gurley Refining Co., Inc., disposed of waste oil, from the rerefining process of used motor oil, in the so-called Gurley pits and as such became an "Operator" for the purpose of 42 U.S.C. §9607(a)(1) and (a)(2). In that litigation the plaintiff herein also established that the defendant, Gurley Refining Co., Inc., was the entity which disposed of the oil from its recycling plant in the so-called Gurley pits. Therefore, the plaintiff herein is judicially estopped from insisting in this litigation that any entity other than Gurley Refining

Co., Inc., was the "Operator" of the disposal area and/or was responsible for the disposal of the waste oil in that disposal area.

49. Additionally, the defendants, William M. Gurley and Betty Gurley, state that from the late 1940s Gurley Oil Co. (which was originally a sole proprietorship owned by William M. Gurley but later became an Arkansas corporation operated in the manner of a partnership by William M. Gurley and Betty Gurley)

* * *

By: GENTRY & BOEHM
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and

By: RIEVES & MAYTON
Attorneys at Law
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West Memphis, AR 72302
(501) 735-3420

By: ELTON A. RIEVES IV

CERTIFICATE OF SERVICE

I, one of the attorneys for the defendants, state that I have served a copy of the foregoing pleading on the attorneys of record by depositing a copy thereof, postage prepaid, in the United States Mail, addressed as follows:

A. Doug Chavis
Assistant U. S. Attorney
P. O. Box 1229
Little Rock, AR 72203

Mr. Craig Johnson
U. S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, DC 20044

Mr. Bob Lawson
Lincoln & Lawson
Centre Place, Suite 200
212 Center Street
Little Rock, AR 72201

Ms. Debra K. Brown
Mitchell, Williams, Selig & Tucker
1000 Savers Federal Building
Capitol Avenue at Spring Street
Little Rock, AR 72201

This 17 day of October, 1989.

ELTON A. RIEVES IV

In the United States District Court
Eastern District of Arkansas
Civil No. J-C-87-291

United States of America, Plaintiff,
v.
Gurley Refining Company,
Gurley Refining Co., Inc.
R. A. Caldwell
William Martin Gurley
Betty Gurley
Larry Gurley Defendants.

United States' First Set of Requests for Admissions to Defendant William M. Gurley

Pursuant to Rules 26, 36 and 37(c) of the Federal Rules of Civil Procedure, the United States requests Defendant William M. Gurley to admit or deny, in writing and under oath, the following requests for admissions and serve such answers on the United States within 30 days.

Definitions and Instructions

Each definition and instruction herein applies fully to each request for admission.

A. If any objection to any of this discovery is made, please state the reasons therefor.

B. For the purposes of these admissions the terms "facility," "hazardous substances" "release," "disposal," "person," "remove" or "removal," "response" and "national

* * *

N. A request that may present for admission a matter that is an ultimate or genuine issue for trial shall not, on that ground alone, be objectionable. F.R.C.P. 36(a).

O. If you fail to admit the truth of any statement contained herein, and the United States thereafter proves the truth of the matter, the United States may apply to the court for an order requiring you to pay the United States' reasonable expenses incurred in making the proof. F.R.C.P. Rule 37(c).

P. In each of the Requests for Admission, the waste products referred to are the waste products produced by the oil re-refinery operated by Gurley Refining Co., Inc., and located at 800 South Main Street, West Memphis, Arkansas.

Q. All references to the masculine gender include the feminine gender.

R. The term "PCB" refers generically to polychlorinated biphenyls.

S. The term "threatened release" has that meaning given in CERCLA.

Requests for Admission

1. Mr. William Gurley was president of Gurley Refining Co., Inc., during the period of time that Gurley Refining Co., Inc., deposited waste material from its re-refining operation located at 800 South Main Street, West Memphis, Arkansas, at the Gurley Pit.

2. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley personally sought a site to dispose of the waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc.

3. Mr. William M. Gurley personally sought a site to dispose of the waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc.

4. Mr. William M. Gurley personally negotiated the lease of the Gurley Pit Site for Gurley Refining Co., Inc., with R. A. Caldwell.

5. Mr. William M. Gurley negotiated the lease of the Gurley Pit Site with R. A. Caldwell.

6. Gurley Refining Co., Inc., and Gurley Refining Company, the corporation, as designated on the lease for the Gurley Pit Site, are one and the same corporations.

7. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley leased the Gurley Pit Site from R. A. Caldwell.

8. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley was the "operator," as that term is defined at 42 U.S.C. §9601(20)(A), of the Gurley Pit Site from approximately 1970 through 1975.

9. Mr. William M. Gurley was the "operator," as that term is defined at 42 U.S.C. §9601(20)(A) of the Gurley Pit Site from approximately 1970 through 1975.

10. "Disposal," as that term is defined at 42 U.S.C. §9601(29), of the waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc., occurred at the Gurley Pit Site while Mr. William M. Gurley was operator of the Site.

11. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley accompanied the driver that dumped the first truck load of waste substances from Gurley Refining Co., Inc., at the Gurley Pit Site.

12. Mr. William Gurley directed employees of Gurley Refining Co., Inc., to place wastes produced by that corporation in the Gurley Pit.

13. Mr. William M. Gurley accompanied the driver that dumped the first truck load of waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc., at the Gurley Pit Site.

14. Mr. William Gurley, in his capacity as president of Gurley Refining Co., Inc., directed employees of Gurley Refining Co., Inc., to place wastes produced by that corporation in the Gurley Pit.

15. The waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc., were deposited, stored, disposed of, or placed, or otherwise came to be located in the Gurley Pit Site while Mr. William M. Gurley was operator of the Site.

16. The waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc., located at 800 S. Main Street, West Memphis, Arkansas, contain P.C.B.'s.

17. The waste substances produced as a result of the re-refining operations at Gurley Refining Co., Inc., located at 800 S. Main Street, West Memphis, Arkansas, contained heavy metals, lead, barium, and zinc.

18. The waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc., located at 800 S. Main Street, West Memphis, Arkansas, contained heavy metals.

* * *

26. Barium is a "hazardous substance" as that term [hazardous substance] is defined in 42 U.S.C. §9601(14).

27. Zinc is a "hazardous substance" as that term [hazardous substance] is defined in 42 U.S.C. §9601(14).

28. "Disposal," as that term is defined at 42 U.S.C. §9601(29), of the hazardous substances occurred at the Gurley Pit Site during the period of time 1970 through 1975 while Mr. William M. Gurley was operator of the Site.

29. Hazardous substances were deposited, stored, disposed of, or placed, or otherwise came to be located in the Gurley Pit Site while Mr. William Gurley was operator of the Site.

30. "Disposal," as that term is defined at 42 U.S.C. §9601(29), of the hazardous substances occurred at the Gurley Pit Site during the period of time 1970 through 1975.

31. Mr. William M. Gurley was responsible for the day to day management of the Gurley Pit Site from 1970 through 1975.

32. Mr. William M. Gurley was responsible for the day to day management of the Gurley Refining Co., Inc., from 1970 through 1975.

33. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley personally selected the Gurley Pit Site as the disposal site for waste substances which resulted from the refining operations of Gurley Refining Co., Inc.

34. Mr. William M. Gurley personally selected the Gurley Pit Site as the disposal site for waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc.

35. The Gurley Pit Site is a "facility" as that term is defined at 42 U.S.C. §9601(9).

36. A "release" as that term is defined at 42 U.S.C. §9601(22), or threat of release, of the waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc., has occurred.

37. A "release" as that term is defined at 42 U.S.C. §9601(22), of the waste substances which resulted from the re-refining operations of Gurley Refining Co., Inc.,

occurred while Mr. William M. Gurley was operator of the Gurley Pit Site.

38. A "release" as that term is defined at 42 U.S.C. §9601(22), of hazardous substances occurred while Mr. William M. Gurley was operator of the Gurley Pit Site.

39. In his capacity as president of Gurley Refining Co., Inc., Mr. William M. Gurley personally directed that the waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc. be deposited, stored, disposed of, placed, or otherwise came to be located at the Gurley Pit Site.

40. Mr. William M. Gurley personally directed that the waste substances produced as a result of the re-refining operations of Gurley Refining Co., Inc. be deposited, stored, disposed of, placed, or otherwise came to be located at the Gurley Pit Site.

41. Mr. William M. Gurley was personally responsible for the day to day operations of the Gurley Refining Co., Inc., plant located at 800 South Main Street, West Memphis, Arkansas.

42. Mr. William M. Gurley was personally responsible for the day to day operations of the Gurley Pit Site.

43. As a result of the release of hazardous substances at the Gurley Pit Site, the United States has incurred "response" costs, as that term [response] is defined at 42 U.S.C. §9601(25).

* * *

56. In the case *United States v. R. A. Caldwell and Gurley Refining Company*, Civil Action No. JC-83-399, the United States District Court for the Eastern District of Arkansas made no determination of the liability of Mr. William M. Gurley under 42 U.S.C. §9607(a).

Respectfully submitted,

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In the United States District Court
Eastern District of Arkansas
Civil No. J-C-87-291

United States of America, Plaintiff,
v.
Gurley Refining Company,
Gurley Refining Co., Inc.
R. A. Caldwell
William Martin Gurley
Betty Gurley
Larry Gurley Defendants.

Motion of Plaintiff United States of America for Partial Summary Judgment under CERCLA §107

The United States of America, plaintiff in this action, hereby moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment on the issue of liability under Section 107(a)(1) and (2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9607(a)(1) and (2), *as amended by* the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), for costs and damages arising from a hazardous waste site operated by the defendants Gurley Refining Company, Inc., and William M. Gurley. The plaintiff respectfully requests that this court find the defendants Gurley Refining Co., Inc. and William M. Gurley liable for the response costs incurred by the United States under Section 107(a)(2)(3) of CERCLA, 42 U.S.C. §9607(a)(2)(3) and enter a declaratory judgment that

Gurley Refining Co., Inc., and William Gurley shall be liable for any response costs incurred by the United States in the future with respect to the Gurley Pit Site. In support of this Motion, the United States submits the attached memorandum in support of its Motion.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 9 1995
CLERK

(3)

No. 94-2009

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM M. GURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that an earlier action under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, in which petitioner was not a party, did not preclude a subsequent action against petitioner under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2009

WILLIAM M. GURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 43 F.3d 1188. The district court's memorandum and order entering judgment against petitioner (Pet. App. A52-A81) is reported at 788 F. Supp. 1473. The district court's memorandum and order granting partial summary judgment against petitioner (Pet. App. A30-A51) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1994. A petition for rehearing was denied on March 9, 1995. Pet. App. A83. The petition for a writ of certiorari was filed on June 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. §§ 9604, 9606 * * *, and imposes the costs of the cleanup on those responsible for the contamination, § 9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989). The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel cleanup actions by responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606-9607 (1988 & Supp. V 1993); see also *United States* v. *Ottati & Goss, Inc.*, 900 F.2d 429, 433 (1st Cir. 1990) (describing federal response options). "CERCLA places the ultimate responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons,'" by authorizing the United States, as well as any other party that incurs eligible response costs, to recoup expenses through cost-recovery actions against liable parties identified in Section 107(a) of CERCLA, 42 U.S.C. 9607(a). *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)); accord *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992).

Liability under Section 107(a) extends to several classes of responsible parties, including persons who have owned or operated facilities at times when hazardous substance disposal occurred. "Persons" liable under Section 107(a)(2) include individuals who operate hazardous-waste facilities on behalf of corporations.[1]

1. Petitioner is president and principal shareholder of the Gurley Refining Company, Inc. (GRC or the Company). For several years, ending in 1975, GRC re-refined used oil at a plant in West Memphis, Arkansas. Pet. App. A3, A30-A31. Wastes from the re-refining process contained barium, lead, zinc, polychlorinated biphenyl compounds (PCBs), and sulfuric acid, all of which are classified as hazardous substances under CERCLA, 42 U.S.C. 6903(5); 40 C.F.R. 116.4. Pet. App. A3. In 1970, after state regulators ordered GRC to cease discharging its wastes into the Mississippi River and other Arkansas waterways, GRC negotiated a lease with R.A. Caldwell to dispose of its wastes on Caldwell's property near Edmondson, Arkansas. *Ibid.*

The disposal site, known as the Gurley Pit, is located about 200 yards from Fifteen Mile Bayou, a tributary of the St. Francis and Mississippi Rivers. Pet. App. A31. In 1975, shortly after GRC was convicted in state court for illegally pumping contam-

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[1] See, *e.g.*, *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); see also *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (corporate officers personally liable if they qualify as CERCLA operators), cert. denied, 502 U.S. 1004 (1991).

inated water from the pit (*id.* at A56-A57; U.S. C.A. App. 6), the Company altered its operations to cease generating the acidic sludge and contaminated filtering material that it had been sending to the Gurley Pit (U.S. C.A. App. 8, 72-74). GRC then closed the pit and terminated its lease. Pet. App. A3. Problems with releases of hazardous substances at the site continued, however. Overflows of contaminated water from the Gurley Pit occurred in 1978 and 1979, polluting nearby surface water and damaging wildlife habitat. *Ibid.*

2. In early 1978, federal and state inspectors notified GRC and site-owner Caldwell that a discharge had occurred and asked them to take prompt action to clean up and contain the wastes. When GRC and Caldwell failed to act, EPA performed the work pursuant to its limited removal authority under Section 311 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1321 (1988 & Supp. V 1993). See Pet. App. A3, A31. In spite of EPA's initial CWA response, however, heavy rains in April 1979 caused a second overflow. During the second incident, nearly 500,000 gallons of oily wastes were released from the Gurley Pit, triggering a second round of EPA containment, cleanup, and disposal efforts pursuant to the CWA. *Id.* at A5, A31, A57.

In late 1983, the United States filed suit against Caldwell and GRC under Section 311(f)(2) of the CWA, seeking to recover the costs of the federal cleanup efforts. In October 1985, the district court granted the United States' cost-recovery claim. *United States* v. *Caldwell*, No. J-C-83-399 (E.D. Ark. Oct. 30, 1985) (*reprinted in* Pet. C.A. Br. Adden. 37-45). The district court ruled that GRC and Caldwell

were jointly and severally liable under Section 311(f)(2) for response costs totalling $76,758.60, and that GRC was responsible for Caldwell's share under the terms of an earlier indemnification judgment. Slip op. 8-9 (Pet. C.A. Br. Adden. 44-45). There was no appeal.

3. Following its initial cleanup and containment actions under the CWA, EPA acted, pursuant to its broader response authority under CERCLA, to implement a more permanent remedy for the persistent environmental threats posed by the Gurley Pit. EPA added the pit to its National Priorities List for CERCLA cleanups in August 1983 (Pet. App. A4, A58), and in May 1985, the agency completed a Remedial Investigation that provided a detailed evaluation of the nature and magnitude of the threat (*id.* at A58). In April 1986, EPA completed a Feasibility Study that evaluated alternative approaches to the containment of remaining wastes. The approach adopted by EPA called for stabilization of contaminated sludges and soils, followed by on-site disposal in a secure landfill. *Id.* at A58-A59.

4. In November 1987, the United States filed the present action under CERCLA to establish liability for the Gurley Pit remedy and to recover its response costs. GRC and petitioner were among the defendants. The complaint sought reimbursement for response costs already incurred under CERCLA, and a declaration that the defendants also would be liable for future costs. On June 14, 1990, the district court entered a final opinion and order disposing of a number of issues in advance of trial. Pet. App. A30-A51. The order rejected arguments by GRC and petitioner that the judgment in *United States* v. *Caldwell*, the earlier CWA action, barred the

CERCLA claims against them under principles of claim preclusion. *Id.* at A37-A38. The court ruled that the CWA and CERCLA actions were distinct for claim preclusion purposes and that, in any event, CERCLA specifically authorizes successive cost-recovery actions. *Ibid.*; see also *id.* at A64 (reaffirming claim preclusion ruling in later order). In March 1992, following a bench trial, the court entered an opinion and order rejecting the defendants' remaining liability defenses and their challenges to EPA's cost claims. *Id.* at A52-A81. The court found GRC, petitioner, and defendant Larry Gurley jointly and severally liable for the United States' past and future CERCLA response costs at the Gurley Pit.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. A1-A29. A majority of the panel agreed with GRC's contention that the United States' CERCLA suit pressed the "same cause of action" against GRC that had been decided against the Company in *United States* v. *Caldwell*. The majority rejected the United States' arguments that its CWA and CERCLA claims should be considered distinct for claim preclusion purposes, and that Section 113(g)(2) of CERCLA, 42 U.S.C. 9613(g)(2), removed any common law restrictions on claim splitting as a bar to its CERCLA action. Section 113(g)(2), the majority concluded, is strictly limited to successive *CERCLA* actions for the recovery of CERCLA response costs. Pet. App. A17-A18. Accordingly, the majority reversed the district court's imposition of CERCLA liability on GRC.[2]

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[2] Judge Gibson, in partial dissent, argued that the United States' CERCLA claim against GRC could not properly have been raised in the CWA litigation and, therefore, could not be

The court of appeals unanimously upheld the CERCLA judgment against petitioner, rejecting his contention that the United States' CERCLA claim was similarly precluded as to him. The court first observed that, because petitioner was not a party to the earlier CWA action (in which GRC and Caldwell were defendants), he could assert the defense of *res judicata* "only if he is a 'privy' to GRC." Pet. App. A19-A20 (citing *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). As a "general rule," the court added, "[c]orporations are treated as entities separate from their officers, directors, and shareholders for purposes of preclusion just as for other purposes." *Id.* at A20 (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4460, at 533 (1981)). The court acknowledged a limited exception to that rule, under which corporate agents and owners who are "named as defendants solely in their [corporate] capacity" may assert a claim preclusion defense based on an earlier judgment against the corporation. *Ibid.* (internal quotation marks omitted). The court concluded, however, that it was "undisputed" that the district court had found petitioner liable "not in his capacity as principal shareholder, president, and director, but as an individual who meets [CERCLA Section 107(a)(2)]'s definition of 'operator.'" *Ibid.* Accordingly, the court of appeals ruled, the CWA judgment against GRC

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barred by that litigation's preclusive effect. The dissent observed that the United States' CERCLA response at the Gurley Pit was in its early stages when the CWA action concluded, and that statute-of-limitations concerns had required the filing of the CWA action before the dimensions of the CERCLA response were known. Pet. App. A28-A29.

could not protect petitioner from the personal liability that he incurred under CERCLA by acting as an "operator" of the Gurley Pit.

ARGUMENT

The court of appeals correctly determined that the CWA suit, to which petitioner was not a party, did not bar the present CERCLA action as to petitioner. The court's ruling against petitioner, moreover, turns largely on the facts of this case and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 20) that the court of appeals erred by considering, in ruling on petitioner's claim preclusion defense, legal arguments first raised by the United States in its brief as appellee. That contention lacks merit. "[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); see also *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970). Accordingly, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). There is no indication that the court of appeals abused its discretion in this case, and, in any event, the court's case-specific action on this issue does not warrant this Court's review.

2. Petitioner also contends (Pet. 21-30) that the court of appeals implicitly resolved disputed factual matters against him in determining (1) that the district court had found him liable under CERCLA

Section 107(a)(2) in his personal capacity rather than as a representative or agent of GRC, and (2) that petitioner was not entitled to share GRC's claim preclusion defense on the basis of privity with the Company. Each of those issues was properly resolved by the court of appeals.

a. As the court of appeals correctly observed (Pet. App. A20), it was "undisputed" before that court "that the district court imposed liability on [petitioner] not in his capacity as principal shareholder, president, and director, but as an *individual* who meets [CERCLA Section 107(a)(2)]'s definition of 'operator.'" (Emphasis added).[3] In response to the United States' argument (U.S. C.A. Br. 20) that petitioner was sued "in his personal capacity" and, therefore, could not claim privity with GRC, petitioner argued only that the law in fact recognized privity as to those in his position (*e.g.*, Pet. C.A. Reply Br. 11, 23); he nowhere disputed that he had been sued in his personal capacity. Having found the personal nature of the CERCLA claim against petitioner to be undisputed, the court of appeals properly resolved that issue in the United States' favor.

In any event, the pleadings and orders in this case unequivocally demonstrate that petitioner was sued and adjudged liable under Section 107(a) of CERCLA

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[3] CERCLA's imposition of personal liability for such conduct "'is distinct from the derivative liability that results from "piercing the corporate veil"' where [courts] hold the owners of a less than bona fide corporation responsible for corporate acts." *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)), cert. denied, 502 U.S. 1004 (1991).

in his personal capacity, based on his role in the creation and operation of the Gurley Pit. The United States' complaint in the CERCLA action alleged that "William Gurley, at all times relevant herein, was responsible for the conduct and management of the Gurley site" (Pet. App. A86), and petitioner's second amended answer responded by denying that "William Martin Gurley, *in his individual capacity*, was at any time responsible for the conduct and management of the Gurley Site" (*id.* at A96 (emphasis added)). The personal nature of the claim against petitioner is similarly evident from the district court briefs and orders. See, *e.g.*, U.S. Motion for Partial Summary Judgment 15-19 (June 29, 1989) (ascribing liability to petitioner under CERCLA authority holding "that corporate officials who participate in the day-to-day activities of hazardous waste disposal are personally liable"). The court of appeals correctly determined that the United States' CERCLA claim against petitioner went to his status as an individual "operator" subject to liability under Section 107(a)(2) of CERCLA by virtue of his own conduct, not to his status as a representative of GRC.

b. Petitioner also contends (Pet. 23-24) that the court of appeals improperly prevented him from developing facts demonstrating that he was in privity with GRC in the CWA action. According to petitioner, evidence of a close relationship between his interests and the interests of GRC at the time of the CWA action would establish the viability of his claim preclusion defense to CERCLA liability, regardless of the capacity in which he was sued and adjudged liable under CERCLA.

Petitioner's assertions regarding allegedly undiscovered facts are not pertinent. As discussed above,

United States v. *Caldwell*, the CWA judgment against GRC and the owner of the Gurley Pit, imposed no personal liability on petitioner. Petitioner was neither named in his individual capacity as a violator of the CWA, nor pursued individually under a theory that GRC functioned as his alter ego. Accordingly, petitioner's alleged de facto participation in the CWA litigation—and his status as director, officer, and shareholder—could shield him only from subsequent litigation in which he is named in his capacity as a representative of the Company. See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 414 (1981) ("participation in a prior action in one legal capacity should not preclude relitigation of the same issues in a different legal capacity"); see generally 1 Restatement (Second) of Judgments § 36, at 359 (1982) (same). The personal defense petitioner seeks to assert in this case is foreclosed by the claim preclusion doctrine's well-established requirement of mutuality. 18 C. Wright, et al., *Federal Practice and Procedure*, *supra*, § 4464, at 588 (discussing the "general assumption" that nonmutual claim preclusion "is not ordinarily available").

Contrary to petitioner's contention (Pet. 17, 30), the court of appeals' decision that, in the absence of mutuality, petitioner could not assert the preclusive effect of the prior action against GRC, is consistent with this Court's decisions. As the Court has stated, "[w]hile mutuality has been for the most part abandoned in cases involving collateral estoppel, it has remained a part of the doctrine of res judicata." *Nevada* v. *United States*, 463 U.S. 110,

143 (1983) (citations omitted).[4] Accord, *e.g.*, *Sidag Aktiengesellschaft* v. *Smoked Foods Prods. Co.*, 776 F.2d 1270, 1275 (5th Cir. 1985) ("identity, or 'mutuality' is in this circuit clearly a prerequisite to the broad bar of relitigation that characterizes claim preclusion"); *Headley* v. *Bacon*, 828 F.2d 1272, 1276-1279 (8th Cir. 1987) ("litigation involving officials in their official capacity does not preclude relitigation in their personal capacity"); *Roy* v. *City of Augusta*, 712 F.2d 1517, 1521 (1st Cir. 1983) (same).

Petitioner's contention (Pet. 23) that, if given the opportunity, he would demonstrate that he "participated in and dominated the litigation in the first proceeding," confuses claim preclusion principles with the doctrine of issue preclusion. Such evidence might be used to establish, under issue preclusion principles, that petitioner is bound by, and entitled to the benefit of, the court's resolution of issues adjudicated in *United States* v. *Caldwell*. See, *e.g.*, *Drier* v. *Tarpon Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975). Because direction of GRC's defense in the

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[4] The *Nevada* decision recognized an exception to the usual requirement of mutuality in the claim preclusion context. There, water users who had not participated in an earlier water rights adjudication were permitted to invoke that judgment as a bar to the United States' attempt to relitigate the same rights. That result, however, "obtained in the unique context of 'a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to.'" *United States* v. *Mendoza*, 464 U.S. 154, 163 n.8 (1984) (quoting *Nevada*, 463 U.S. at 143). Petitioner here cannot invoke the exceptionally strong reliance interests and expectations of finality that gave rise to the narrow exception to the mutuality requirement recognized in *Nevada*.

CWA action could not have given rise to any risk of personal liability for petitioner,[5] however, evidence as to his role in that litigation could not correct the nonmutuality problem that defeats his claim preclusion defense. See *Montana* v. *United States*, 440 U.S. 147, 154 (1979) (preclusion applicable to nonparties as a result of their control of earlier litigation "falls under the rubric of collateral estoppel [issue preclusion] rather than res judicata [claim preclusion] because the latter doctrine presupposes identity between causes of action"); 1B J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 0.411[6], at III-249 to III-250 (1995) (to the same effect).[6]

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[5] Petitioner cites *In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985), for the proposition that direction of GRC's defense in *United States* v. *Caldwell* bound him in his personal capacity to the judgment in that action and entitles him now to invoke its preclusive effect. See Pet. 14 n.10. In *Teltronics*, a corporation president, a participating nonparty in earlier litigation initiated by his corporation, sought to relitigate issues that the corporation had lost. The corporation president was precluded from reasserting "the same cause of action" that the corporation had asserted at his direction. 762 F.2d at 192. The decision contains no suggestion that a judgment on claims asserted against the corporation in the initial action would have been treated as binding on the company president in his personal capacity.

[6] To the extent that petitioner's assertion that GRC functioned as his "alter ego" (Pet. 12 n.8, 23, 31) is intended to suggest an alternative cure for the nonmutuality problem, it is similarly without merit. If petitioner had incurred personal liability *in the CWA action* on an alter-ego or "veil piercing" theory, an argument might have been made that the United States was obliged to raise its claim against petitioner under Section 107(a)(2) in conjunction with its CWA claims. Although we do not believe that such an argument would be correct, petitioner is not in a position to make it. Absent notice that the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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United States sought to impose personal liability under an alter-ego or "veil piercing" theory in the CWA action, the judgment there could not create personal liability. See, *e.g.*, 2 Restatement (Second) of Judgments § 59(5), at 95 (1982) (a judgment against a corporation that functions as the alter ego of an individual imposes personal liability on that individual only if the individual receives "notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment").